

No. 15082

United States
Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,
vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-11-56

MAY 24 1956



No. 15082

United States
Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,

Appellant,

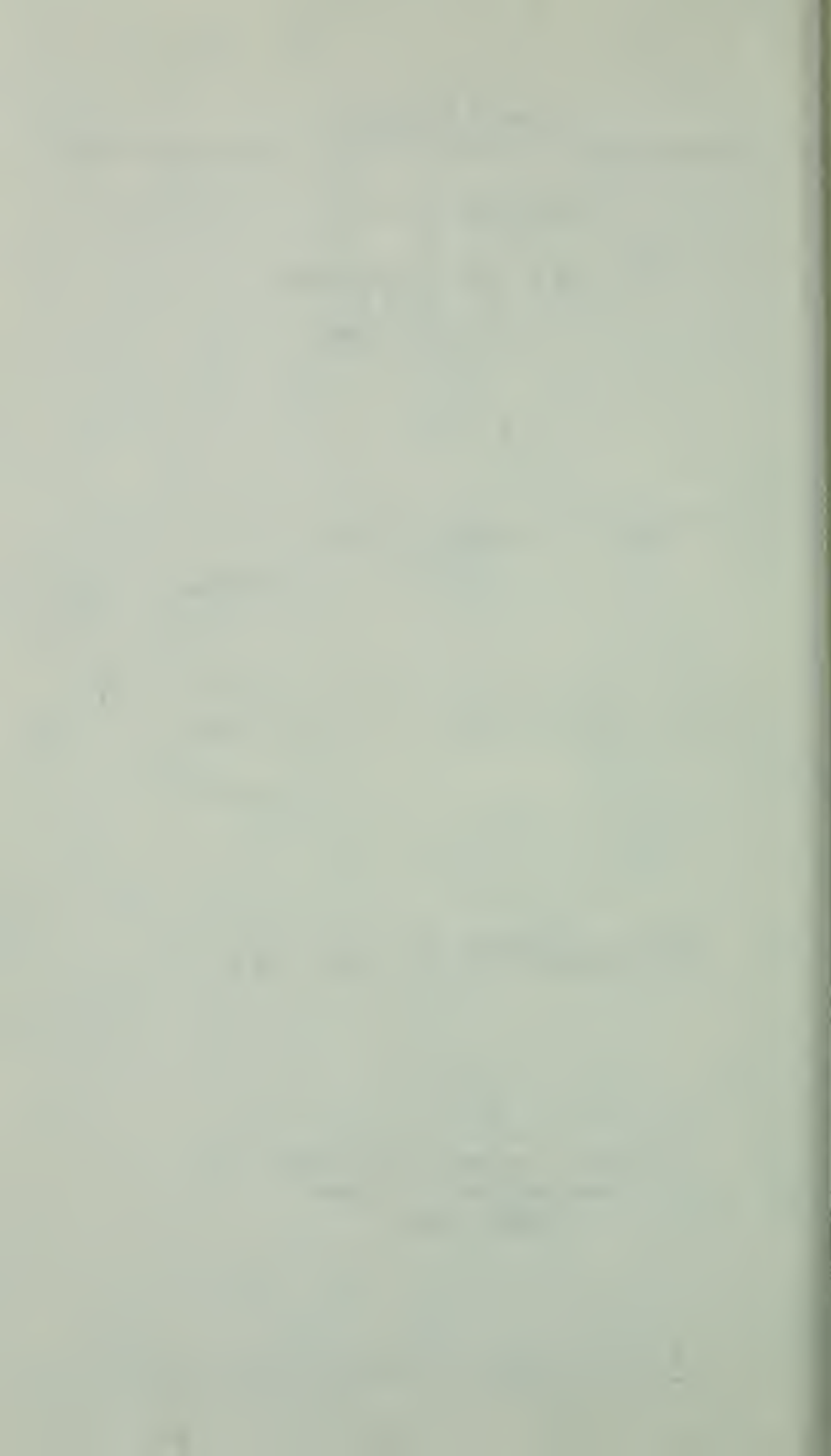
vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,

Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | PAGE |
|--|--------|
| Answer | 15 |
| Attorneys, Names and Addresses of | 1 |
| Clerk's Certificate | 428 |
| Complaint | 3 |
| Ex. A—City of Anchorage Electric Light and Power Service Rates | 11 |
| Complaint, Supplemental, Filed March 1, 1955 | 25 |
| Complaint, Supplemental, Filed March 23, 1955 | 28 |
| Decree | 59 |
| Findings of Fact and Conclusions of Law | 49 |
| Judgment and Decree | 55 |
| Minute Entries: | |
| March 18, 1955—Pre-Trial Conference | 27 |
| March 24, 1955—Pre-Trial Conference .. | 38, 39 |
| March 28, 1955—Re Motion to Dismiss | 43 |
| March 28, 1955—Motion to Dismiss and De- nial | 44 |
| June 17, 1955—Re Hearing on Objections of Findings of Fact and Conclusions of Law and Judgment | 53 |

| INDEX | PAGE |
|---|----------|
| Motion for New Trial | 61 |
| Motion for Substitution of Attorneys | 66 |
| Order Re | 67 |
| Notice of Appeal | 64 |
| Notice of Demand to Produce Documents | 36 |
| Opinion | 45 |
| Order Denying New Trial | 63 |
| Order Granting Extension of Time in Which to Docket and File the Record on Appeal | 65 |
| Statement of Points | 431 |
| Stipulation Filed March 23, 1955 | 32 |
| Stipulation Re Supplements to Complaint | 25 |
| Transcript of Proceedings | 67 |
| Witnesses, Defendant's: | |
| Nichols, George W. | |
| —direct | 363 |
| —cross | 370 |
| —redirect | 372 |
| —recross | 373 |
| Reuss, Willard H. | |
| —direct | 375 |
| —cross | 391, 399 |
| —redirect | 420 |

INDEX

PAGE

Witnesses, Plaintiff's:

Hall, Lela Mae

| | |
|-----------------|-----|
| —direct | 161 |
| —cross | 179 |
| —redirect | 232 |
| —recross | 236 |

Reischling, Floyd M.

| | |
|---------------|----------|
| —direct | 338 |
| —cross | 345, 349 |

Retherford, Robert W.

| | |
|-----------------|----------|
| —direct | 277 |
| —cross | 297, 307 |
| —redirect | 319, 325 |
| —recross | 324 |

Sarno, Herman B.

| | |
|-----------------|-----|
| —direct | 239 |
| —cross | 251 |
| —redirect | 272 |



NAMES AND ADDRESSES OF ATTORNEYS

HARTLIEB, GROH & RADER, By

JOHN L. RADER,

Fifth Ave. & E St.,
Anchorage, Alaska;

LYNN W. KIRKLAND,

City Attorney,
Anchorage, Alaska,

For the Appellant.

HELLENTHAL, HELLENTHAL & COTTIS, By

JOHN S. HELLENTHAL,

RALPH H. COTTIS,

P. O. Box 941,

Anchorage, Alaska,

For Appellee, Richardson Vista Corp.

F. M. REISCHLING,

452 Central Bldg.,

Seattle, Washington;

ALBERT MAFFEI,

718 Fifth Ave.,

Anchorage, Alaska,

For Appellee Panoramic View Corp.

In the District Court for the Territory of Alaska,
Third Division

No. A7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Cor-
poration,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Defendant.

COMPLAINT

Plaintiffs Richardson Vista Corporation and
Panoramic View Corporation allege:

I.

That at all times herein mentioned plaintiffs were
and now are corporations duly organized and exist-
ing under the laws of the State of Washington; that
they have paid their annual Alaska corporation
license fee or tax last due and have filed their an-
nual reports for the last fiscal year and have fully
complied with the laws of the Territory of Alaska
relating to corporations of their classification.

II.

That the defendant, City of Anchorage, is a mu-
nicipal corporation organized and existing pursuant
to and by virtue of the laws of the Territory of
Alaska.

III.

That plaintiff Richardson Vista Corporation is the owner of a housing project located on Government Hill, Anchorage, Alaska, comprising nineteen (19) separate buildings, each of which consists of twenty-two (22) units; that plaintiff Panoramic View Corporation is the owner of a housing project adjacent to plaintiff Richardson Vista Corporation's housing project, located on Government Hill, Anchorage, Alaska, comprising fourteen (14) separate buildings, eight (8) of which consist of twenty-two (22) units, four (4) of which have sixteen (16) units, and two (2) of which consist of twelve (12) units. That plaintiff Richardson Vista Corporation's buildings are located on approximately twenty-three (23) acres of land leased by plaintiff Richardson Vista Corporation from the United States Army; that plaintiff Panoramic View Corporation's project is located on approximately seventeen (17) acres of land leased by said plaintiff from the United States Government Department of the Interior; that both of said tracts are unsubdivided and located within the City of Anchorage; that the streets and ways within both of said projects are the property of plaintiffs and have not been dedicated to the use of the public generally.

IV.

That plaintiff Richardson Vista Corporation's real property interests and plaintiff Panoramic View Corporation's real property interests, for tax purposes, are treated by the City of Anchorage as

two (2) units, one belonging to the first named plaintiff and the second belonging to the second named plaintiff.

V.

That both of plaintiffs' projects are commercial establishments and are managed by a single business entity, namely, Anchorage Rental Service, a partnership, and uniformly used for apartment dwellings under uniform leases with common maintenance and supervision.

VI.

That all of both the plaintiffs' buildings were completed and occupied during the summer of 1951; that plaintiffs' buildings were erected pursuant to regulations of the Federal Housing Administration and plaintiffs' loans, made in connection with the construction thereof, were insured by said agency; that plaintiffs' buildings are widely separated in order to provide light, air and lawns around the apartment units, and to avoid a mechanical uniform outlook; that plaintiffs, in financing their projects, each entered into a single mortgage as to their separate interests covering the entire plat and real estate upon which all of each plaintiffs' buildings are located.

VII.

That plaintiffs are each furnished electricity by defendant and were billed as follows for the months of August, September, October, November and December, 1951, by defendant for electricity consumed by plaintiffs in connection with their buildings for

hall and garage lighting, exterior lighting, laundry and drying room lighting, current supplied to dryers, washing machines, pumps and steam conversion equipment, (But not for plaintiffs' tenants' electric consumption, which is the responsibility of the tenants, and for which they are individually billed and metered.):

(a) Richardson Vista—(Buildings No. 1 through No. 19):

| 1951 | Consumption | Amount as Billed | Correct Billing per Plaintiffs' Theory | Diff. |
|-----------------------|-------------|------------------|--|------------|
| August (9 bldgs.) | 10,052 | \$ 546.82 | \$ 437.08 | \$ 109.74 |
| September (19 bldgs.) | 51,486 | 2,692.83 | 2,094.44 | 598.39 |
| October (19 bldgs.) | 40,478 | 2,277.57 | 1,654.12 | 623.45 |
| November (19 bldgs.) | 47,560 | 2,502.93 | 1,937.40 | 565.53 |
| December (19 bldgs.) | 42,836 | 2,382.30 | 1,748.44 | 633.86 |
| Total Overcharge | | | | \$2,530.97 |

(b) Panoramic View—(Buildings No. 20 through 33):

| 1951 | Consumption | Amount as Billed | Correct Billing per Plaintiffs' Theory | Diff. |
|----------------------|-------------|------------------|--|------------|
| August (no bldgs.) | — | — | — | — |
| September (4 bldgs.) | 7,614 | \$ 429.87 | \$ 339.56 | \$ 90.31 |
| October (11 bldgs.) | 18,724 | 1,083.05 | 783.96 | 299.09 |
| November (14 bldgs.) | 33,524 | 1,832.38 | 1,375.96 | 456.42 |
| December (14 bldgs.) | 30,488 | 1,697.47 | 1,134.52 | 562.95 |
| Total Overcharge | | | | \$1,408.77 |
| Grand Total | | | | \$3,939.74 |

VIII.

That in accordance with the electrical code of defendant City of Anchorage, plaintiffs were required to wire each building so that each of the tenants therein would be separately metered and so

that a meter in each building would be installed to measure the consumption described in the preceding paragraph of this complaint, or Paragraph VII; that meters as aforescribed were installed and are presently installed as afore described in all the plaintiffs' buildings.

IX.

That the rates of defendant City of Anchorage presently in force and governing electric consumption of customers of the City of Anchorage are set forth in their entirety in the attached Exhibit "A," which is hereby incorporated in this complaint as if set out in full herein and made a part hereof.

X.

That each of plaintiffs were separately billed monthly through their agent, Anchorage Rental Service, for each of the thirty-three (33) buildings contained in both projects, as completed and occupied and as shown in Paragraph VII, *supra*; that Schedule "C" or the commercial rate was applied to each of plaintiff Richardson Vista Corporation's buildings and to each of plaintiff Panoramic View Corporation's buildings by defendant City of Anchorage, considering each building as a separate customer for the months of August, September, October, November and December, 1951; that each of plaintiffs are a single customer of the City of Anchorage and entitled to the application of Schedule "C" to their total consumption for the purposes described in Paragraph VII *supra*, instead of treat-

ing each of plaintiffs' buildings as a separate customer.

XI.

That the total monthly electrical consumption and billing under the terms of defendant's Schedule "C," for the purposes described in Paragraph VII *supra*, of all of plaintiffs' buildings as completed and occupied is shown in the tabulation in Paragraph VII *supra*, for each of the months herein mentioned.

XII.

That by virtue of defendants' erroneous and incorrect application of its commercial rate to plaintiffs' consumption of electrical energy, each of plaintiffs have paid for electrical energy in an amount grossly in excess of what plaintiffs should rightfully pay had defendant's commercial rates been properly applied to plaintiffs' consumption, namely, \$2530.97, in the case of plaintiff Richardson Vista Corporation and \$1408.77, in the case of plaintiff Panoramic View Corporation; that defendant, in the application of its electrical rate to plaintiffs, has acted arbitrarily, unjustly, unequally, unreasonably, discriminatorily, non-uniformly and confiscatorily to its unjust enrichment and will continue said practice unless restrained.

XIII.

That other electrical consumers and customers of defendant similarly situated in the City of Anchorage are given the benefit of but one application of Schedule "C" to their entire consumption identical

with plaintiffs' consumption as described in Paragraph VII, particularly large apartment buildings located on similar unsubdivided contiguous tracts; that plaintiffs' projects are like one apartment consisting of many units in separate buildings; that at the time plaintiffs' projects were being designed, plaintiffs were informed by defendant that they would be granted a "wholesale" rate on that portion of electrical consumption used by them for the purposes described in Paragraph VII.

XIV.

That plaintiffs protested to defendant's governing board, namely, its City Council, the aforedescribed application of its rates to plaintiffs, and requested that the rate be properly applied; that at their appearance before the City Council, plaintiffs brought all of the matters herein mentioned to the attention of said body and fully and completely stated its grounds for protest; that this request was denied on November 9, 1951, by the City Council of defendant; that plaintiffs have exhausted all of their administrative remedies with regard to their complaint against defendant.

XV.

That all of the payments made by plaintiffs to defendant in connection with the furnishing of electrical energy as described in Paragraph VII hereof have been made; that all payments were paid under protest and the checks therefor clearly so marked with reference made to an accompanying letter of

protest, which accompanied each of said payments and gave the reasons therefor. That no portion of said payments has been repaid to plaintiffs or to anyone for or on their account; that the payments so made under protest were made by plaintiffs involuntarily and solely to avoid the threatened imposition of statutory penalties and the discontinuance of plaintiffs' electrical services and other utility services by the defendant for non-payment of its electrical utility charges in accordance with the ordinances of the City of Anchorage, as contained particularly in Section 603, Article 6, Chapter III, Anchorage General Code, passed and approved April 12, 1950; that defendant has continued its erroneous and discriminatory billing since November 9, 1951, and threatens and indicates that it will continue said billing; that by reason of the foregoing, plaintiffs have no plain, speedy, adequate nor proper remedy at law to recover back their payments so paid under protest.

Wherefore plaintiffs pray:

(a) That defendant City, its agents, officers and employees, be enjoined from charging each of plaintiffs defendant's commercial electrical rate or tariff in the manner aforescribed and ordered to apply the commercial rate to each of plaintiffs total consumption, and be ordered to desist from charging each of plaintiffs' buildings as if they were separate consumers of defendant.

(b) That defendant City, its agents, officers and employees, be ordered and directed to repay to

plaintiff Richardson Vista Corporation the sum of \$2530.97, together with interest at the rate of six per cent (6%) per annum from date of each respective protest until so repaid, and similarly the amount of \$1408.77 to plaintiff Panoramic View Corporation.

(c) For costs and disbursements herein incurred, together with a reasonable attorneys' fee in the amount of \$.....

(d) For such other and further relief as the Court deems just and equitable.

HELLENTHAL,

HELLENTHAL & COTTIS,

By /s/ RALPH H. COTTIS,

Of Attorneys for Plaintiffs.

Duly verified.

EXHIBIT "A"

City of Anchorage, Alaska,
Electric Light and Power Service

Permits must be obtained for all electrical work.

Application for electric energy will be received at the City Clerk's Office, City Hall, between 8 a.m. and 3 p.m. daily, except Saturdays, Sundays and Holidays. A removal charge will be made on meters not retained six months.

Light and Power Tariff

Schedule (D) Domestic Rate:

This schedule is applicable to single phase service furnished for lighting, cooking, small appliances and for incidental single phase motors not in excess of five (5) horsepower, in private, single family residences and in separately metered single family apartments.

| | |
|---------------------------------------|--------|
| First 15 KWHrs | 10c |
| Next 50 KWHrs | 7c |
| Next 100 KWHrs | 5½c |
| Excess KWHrs | 4½c |
| Minimum monthly charge per meter..... | \$1.50 |

Schedule (C) Commercial Rate:

This service applicable to single phase service for lighting, cooking, small appliances and incidental single phase motors not in excess of five (5) horsepower, in professional, mercantile, industrial and other establishments not classed as single family residences.

| | |
|---------------------------------------|--------|
| First 25 KWHrs | 10c |
| Next 50 KWHrs | 8c |
| Next 50 KWHrs | 7c |
| Next 1000 KWHrs | 6c |
| Next 1000 KWHrs | 5c |
| Excess KWHrs | 4c |
| Minimum monthly charge per meter..... | \$1.00 |

Schedule (B) Commercial Baking—Off Peak Load:

This schedule applicable for baking only in commercial bakeries where the customer's installation includes heavy duty bake ovens. The period of operation is from 1 a.m. to 6 a.m. These ovens shall not be operated at any other time.

Rate per KWHrs 2c

Minimum monthly charge\$5.00

Schedule (P) Commercial Power Rate:

This schedule is applicable to service for motors and other power devices not specifically covered by other schedules. No service shall be furnished under this schedule for generators supplying energy direct to lighting circuits.

Rate per KWHrs 5c

Minimum monthly charge per horsepower.\$1.00

Maximum on minimum charge.....\$5.00

Schedule (WD) Controlled Water Heating Service:

This schedule is applicable only to separately metered 230-volt circuit. Service furnished during limited service hours, for electric storage type water heating equipment in single family dwellings.

Per KWHrs027c

Minimum monthly charge per meter

\$3.50 for first 250 KW.

Schedule (WC):

This schedule is applicable only to separately metered 230-volt circuit. Service furnished during

limited hours only, for electric storage type water heating equipment in other than single family houses.

| | |
|--------------------------------------|--------|
| Rate per KWHrs | .027c |
| Minimum monthly charge per meter.... | \$7.00 |

Rural Rates Schedule

Schedule (D) Domestic Rate:

| | |
|---------------------------------------|--------|
| First 15 KWHrs | 11c |
| Next 50 KWHrs | 8c |
| Next 100 KWHrs | 6½c |
| Excess KWHrs | 5½c |
| Minimum monthly charge per meter..... | \$1.50 |

Schedule (C) Commercial Rate:

| | |
|-----------------------|-----|
| First 25 KWHrs | 11c |
| Next 50 KWHrs | 9c |
| Next 50 KWHrs | 8c |
| Next 1000 KWHrs | 7c |
| Next 1000 KWHrs | 6c |
| Excess KWHrs | 5c |

Schedule (WD) Controlled Water Heating Service —Domestic:

This schedule is applicable only to separately metered 230-volt circuit. Service furnished during limited service hours, for electric storage type water heating equipment in single family dwellings.

| | |
|-----------------------------------|--------|
| 250 KWHrs or less per month | \$4.50 |
| Excess KWHrs | .027 |

Schedule (WC) Controlled Water Heating Service
—Commercial:

| | |
|-----------------------------------|--------|
| 500 KWHrs or less per month | \$8.50 |
| Excess KWHrs | .027 |

Schedule (P) Power Rate—Commercial:

| | |
|-------------------------------------|--------|
| Per KWHrs | 6c |
| Minimum charge per horsepower | \$1.00 |

Under schedule (WD) controlled water heating service, hot water tanks are equipped with an electric time clock, which disconnects the current between the hours of 4 p.m. and 7 p.m. daily.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

ANSWER

Defendant, City of Anchorage, a municipal corporation, in answer to the plaintiffs and each of the plaintiff's complaint, admits, denies and alleges as follows:

I.

Defendant, not having sufficient information or belief upon which to base an answer to paragraph I of plaintiffs' complaint, denies each and every allegation contained therein.

II.

Defendant admits the allegations contained in paragraph II of plaintiffs' complaint.

III.

Defendant, not havong sufficient information or belief upon which to base an answer to paragraph III of plaintiffs' complaint, denies each and every allegation contained therein.

IV.

Defendant admits the allegations contained in paragraph IV of plaintiffs' complaint.

V.

Defendant, not having sufficient information or belief upon which to base an answer to paragraph V of plaintiffs' complaint, denies each and every allegation contained therein.

VI.

Defendant, not having sufficient information or belief upon which to base an answer to paragraph VI of plaintiffs' complaint, denies each and every allegation contained therein.

VII.

Defendant admits each and every allegation contained in paragraph VII of plaintiffs' complaint except it denies that the bills set out therein are correct. In connection with the foregoing denial, the defendant alleges that the correct billings for the plaintiffs for the months of August, September, October, November and December, 1951, were and are as set out in Schedule A as pertains to Richardson Vista Corporation and Schedule B as pertains to Panoramic View Corporation of this, the defend-

ant's answer, which Schedules A and B are by reference incorporated herein and made a part of this answer as if fully set out herein.

VIII.

Defendant admits the allegations contained in paragraph VIII of the plaintiffs' complaint.

IX.

Defendant admits the allegations contained in paragraph IX of the plaintiffs complaint.

X.

Defendant admits only so much of paragraph X of plaintiffs' complaint which alleges that each of the plaintiffs were separately billed monthly for each of the buildings contained in both projects, and that Schedule C, or commercial rates, were applied to each of plaintiffs' buildings, considering each building as a separate customer for the months of August to December, 1951, inclusive. Defendant denies each and every other allegation therein contained.

XI.

Defendant denies each and every allegation contained in paragraph XI of the plaintiffs' complaint and alleges that the total monthly electrical consumption and billing under Schedule C in Exhibit A of the plaintiffs' complaint is as set out in the defendant's Schedule A as applies to Richardson Vista Corporation and defendant's Schedule B as applies to Panoramic View Corporation for each

month shown in defendant's Schedules A and B respectively.

XII.

Defendant denies each and every allegation contained in paragraph XII of plaintiffs' complaint and alleges that the defendant has billed the plaintiffs and each of them properly for the months of August to December, 1951, inclusive, as shown in defendant's Schedules A and B heretofore referred to.

XIII.

Defendant denies each and every allegation contained in paragraph XIII of plaintiffs' complaint.

XIV.

Defendant admits only so much of paragraph XIV of the plaintiffs' complaint which reads, "That plaintiffs protested to defendant's governing board, namely, its City Council, the aforescribed application of its rates to plaintiffs." That defendant denies that its rates were improperly applied to the plaintiffs and defendant further alleges that the plaintiffs, nor either of them, had any valid basis for protesting the application of the defendant's electrical rates.

XV.

As to paragraph XV of the plaintiffs' complaint, the defendant denies that all payments have been made by the plaintiffs and each of them to the defendant in connection with the furnishing of electrical energy as described in paragraph VII of the plaintiffs' complaint, but admits payment by the

plaintiffs and each of them for billings of electrical energy as billed by the defendant as set out in Schedules A and B, respectively, of defendant's answer; defendant admits that all payments made to it by the plaintiffs for electrical energy and billed by the defendant were paid under protest and that no portions of said payments paid under protest have been repaid to plaintiffs for or on their account. Defendant, not having sufficient information or belief upon which to base an answer as to whether the payments made under protest by the plaintiffs were involuntary and solely to avoid the threatened imposition of statutory penalties and the discontinuance of plaintiffs' electrical services and other utility services by the defendant for non-payment of electrical utility charges, denies each and every allegation to that effect as set out in paragraph XV of plaintiffs' complaint. Defendant denies that it has erroneously and discriminatively billed plaintiffs, or either of them, for electrical energy either before or since November 9, 1951, and in this connection, alleges that its billings have been proper and reasonable. Defendant denies that the plaintiffs, or either of them, are entitled to recover back from the defendant any payments whatsoever made by the plaintiffs, or either of them, under protest.

Wherefore, defendant having answered plaintiffs, and each of the plaintiff's complaint, prays:

1. That the plaintiffs, or either of them, take nothing by this action, and that the complaint be dismissed.

2. That the defendant have and recover from and of the plaintiffs, and each of them, costs and disbursements herein incurred by the defendant, together with a reasonable attorneys' fee for defending same.

3. Defendant demands a jury trial.

4. For such other and further relief as the Court deems just and equitable.

KAY, ROBISON and MOODY,

By /s/ RALPH E. MOODY,

Of Attorneys for Defendant.

Duly verified.

Schedule A

City of Anchorage

Electrical Service to Richardson Vista

| 1951 | Building No. | Consumption | Charge |
|-----------|--------------|-------------|----------|
| August | 1 | 1,008 | \$ 62.98 |
| | 2 | 1,128 | 70.15 |
| | 3 | 978 | 61.18 |
| | 4 | 2,252 | 125.08 |
| | 5 | 824 | 51.94 |
| | 16 | 842 | 40.97 |
| | 17 | 888 | 43.04 |
| | 18 | 910 | 44.03 |
| | 19 | 986 | 47.45 |
| September | 1 | 2,550 | 137.00 |
| | 2 | 2,590 | 138.60 |
| | 3 | 2,488 | 134.52 |
| | 4 | 1,146 | 71.05 |
| | 5 | 2,298 | 126.92 |
| | 6 | 2,958 | 153.32 |

| 1951 | Building No. | Consumption | Charge |
|-----------|--------------|-------------|-----------|
| September | 7 | 2,888 | \$ 150.52 |
| | 8 | 534 | 34.54 |
| | 9 | 3,160 | 161.40 |
| | 10 | 3,364 | 169.56 |
| | 11 | 3,634 | 150.36 |
| | 12 | 3,144 | 160.76 |
| | 13 | 3,024 | 155.96 |
| | 14 | 3,492 | 174.68 |
| | 15 | 3,924 | 191.96 |
| | 16 | 3,556 | 177.24 |
| | 17 | 2,358 | 129.32 |
| | 18 | 2,186 | 122.44 |
| | 19 | 2,192 | 122.68 |
| October | 1 | 1,334 | 80.45 |
| | 2 | 2,272 | 125.88 |
| | 3 | 2,182 | 122.28 |
| | 4 | 2,380 | 130.20 |
| | 5 | 1,852 | 106.35 |
| | 6 | 2,004 | 113.95 |
| | 7 | 1,870 | 107.25 |
| | 8 | 3,088 | 158.52 |
| | 9 | 2,228 | 124.12 |
| | 10 | 2,426 | 132.04 |
| | 11 | 2,556 | 161.24 |
| | 12 | 2,354 | 129.16 |
| | 13 | 2,276 | 126.04 |
| | 14 | 2,246 | 124.84 |
| | 15 | 2,408 | 131.32 |
| | 16 | 1,008 | 62.98 |
| | 17 | 2,014 | 114.45 |
| | 18 | 2,030 | 115.25 |
| | 19 | 1,950 | 111.25 |
| November | 1 | 3,056 | 157.24 |
| | 2 | 2,546 | 136.84 |
| | 3 | 2,488 | 134.52 |
| | 4 | 2,506 | 135.24 |
| | 5 | 2,326 | 128.04 |
| | 6 | 2,340 | 128.60 |
| | 7 | 2,182 | 122.28 |

| 1951 | Building No. | Consumption | Charge |
|----------|--------------|-------------|-----------|
| November | 8 | 2,392 | \$ 130.68 |
| | 9 | 2,550 | 137.00 |
| | 10 | 2,594 | 138.76 |
| | 11 | 2,664 | 141.56 |
| | 12 | 2,678 | 142.12 |
| | 13 | 2,386 | 130.44 |
| | 14 | 2,350 | 129.00 |
| | 15 | 2,554 | 137.16 |
| | 16 | 2,242 | 124.68 |
| | 17 | 2,334 | 128.36 |
| | 18 | 2,078 | 117.65 |
| | 19 | 2,294 | 126.76 |
| December | 1 | 2,302 | 127.08 |
| | 2 | 1,980 | 112.75 |
| | 3 | 2,534 | 136.36 |
| | 4 | 2,322 | 127.88 |
| | 5 | 1,986 | 113.05 |
| | 6 | 2,280 | 126.20 |
| | 7 | 1,840 | 105.75 |
| | 8 | 2,100 | 118.75 |
| | 9 | 2,098 | 122.92 |
| | 10 | 2,106 | 119.05 |
| | 11 | 2,582 | 138.28 |
| | 12 | 2,418 | 131.72 |
| | 13 | 3,256 | 165.24 |
| | 14 | 2,086 | 126.55 |
| | 15 | 2,436 | 132.44 |
| | 16 | 2,120 | 119.75 |
| | 17 | 2,182 | 122.28 |
| | 18 | 1,918 | 109.65 |
| | 19 | 2,290 | 126.60 |
| 1952 | | | |
| January | 1 | 1,596 | 93.55 |
| | 2 | 1,558 | 91.65 |
| | 3 | 2,300 | 127.00 |
| | 4 | 1,944 | 110.95 |
| | 5 | 1,640 | 95.75 |
| | 6 | 2,112 | 109.48 |
| | 7 | 1,500 | 88.75 |
| | 8 | 2,102 | 118.85 |

| 1951 | Building No. | Consumption | Charge |
|---------|--------------|-------------|-----------|
| January | 9 | 1,992 | \$ 118.35 |
| | 10 | 1,784 | 102.95 |
| | 11 | 4,656 | 211.24 |
| | 12 | 2,130 | 120.20 |
| | 13 | 828 | 52.18 |
| | 14 | 1,784 | 102.95 |
| | 15 | 2,028 | 115.15 |
| | 16 | 1,804 | 103.95 |
| | 17 | 1,736 | 110.55 |
| | 18 | 1,578 | 92.65 |
| | 19 | 1,908 | 109.15 |

Schedule B

City of Anchorage

Electrical Service to Panoramic View

| 1951 | Building No. | Consumption | Charge |
|-----------|--------------|-------------|-----------|
| September | 20 | 2,292 | \$ 126.68 |
| | 21 | 2,526 | 136.04 |
| | 22 | 1,686 | 98.05 |
| | 23 | 1,110 | 69.10 |
| October | 20 | 1,722 | 100.00 |
| | 21 | 1,918 | 109.65 |
| | 22 | 1,648 | 94.15 |
| | 23 | 1,924 | 109.95 |
| | 24 | 1,916 | 109.55 |
| | 25 | 1,524 | 89.95 |
| | 26 | 1,166 | 72.05 |
| | 27 | 870 | 54.70 |
| | 31 | 2,062 | 116.85 |
| | 32 | 1,894 | 108.45 |
| | 33 | 2,080 | 117.75 |
| November | 20 | 2,526 | 136.04 |
| | 21 | 2,600 | 139.00 |
| | 22 | 2,422 | 131.88 |
| | 23 | 2,456 | 133.24 |
| | 24 | 2,656 | 141.24 |
| | 25 | 2,540 | 136.60 |

| 1951 | Building No. | Consumption | Charge |
|----------|--------------|-------------|-----------|
| November | 26 | 2,670 | \$ 141.80 |
| | 27 | 2,686 | 142.44 |
| | 28 | 2,376 | 130.04 |
| | 29 | 2,858 | 149.32 |
| | 30 | 2,488 | 134.52 |
| | 31 | 2,384 | 130.36 |
| | 32 | 1,442 | 85.85 |
| | 33 | 1,726 | 100.05 |
| December | 20 | 2,308 | 127.32 |
| | 21 | 2,152 | 121.08 |
| | 22 | 1,938 | 110.65 |
| | 23 | 2,246 | 124.84 |
| | 24 | 2,580 | 138.20 |
| | 25 | 2,360 | 129.40 |
| | 26 | 2,280 | 126.20 |
| | 27 | 2,368 | 129.72 |
| | 28 | 2,422 | 131.88 |
| | 29 | 2,042 | 115.85 |
| | 30 | 2,084 | 117.95 |
| | 31 | 2,352 | 129.08 |
| | 32 | 1,468 | 87.15 |
| | 33 | 1,888 | 108.15 |
| 1952 | | | |
| January | 20 | 1,744 | 100.95 |
| | 21 | 1,760 | 101.75 |
| | 22 | 1,602 | 78.85 |
| | 23 | 1,796 | 103.55 |
| | 24 | 2,990 | 127.30 |
| | 25 | 2,124 | 120.00 |
| | 26 | 1,668 | 96.15 |
| | 27 | 1,630 | 95.25 |
| | 28 | 1,824 | 104.95 |
| | 29 | 1,676 | 97.55 |
| | 30 | 1,426 | 85.05 |
| | 31 | 2,064 | 116.95 |
| | 32 | 1,408 | 84.15 |
| | 33 | 1,850 | 106.25 |

Service of copy acknowledged.

[Endorsed]: Filed February 13, 1952.

[Title of District Court and Cause.]

STIPULATION

The above parties by their respective attorneys stipulate that the complaint herein may be supplemented at any time to and including March 10, 1955.

Dated at Anchorage, Alaska, this 1st day of March, 1955.

HELLENTHAL,
HELLENTHAL & COTTIS,

By /s/ RALPH H. COTTIS,
Attorneys for the Plaintiffs.

/s/ JOHN L. RADER,
Attorney for the Defendants.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Plaintiff Richardson Vista Corporation supplements complaint heretofore filed in the above-entitled action as follows:

1. That the following new paragraph be added to Paragraph VII(a) of said complaint:

That during the calendar years 1952, 1953 and 1954, plaintiff Richardson Vista Corporation was billed monthly as if each of plaintiffs' nineteen

buildings were a separate customer of defendant. That during the period from August 1, 1951, through December, 1954, plaintiff Richardson Vista Corporation was overcharged \$20,590.66; that defendant since December, 1954, has continued to overcharge said plaintiff and threatens to continue such overcharges, all to plaintiff's damage in the estimated amount of \$400 per month.

2. That Paragraph X of plaintiffs' Richardson Vista Corporation's complaint be supplemented by adding the following sentence thereto:

That plaintiff Richardson Vista Corporation's nineteen buildings were considered as nineteen customers of defendant during the calendar years 1952, 1953 and 1954, and continue to be so considered.

3. That Paragraph XII of plaintiff Richardson Vista Corporation's complaint be supplemented by striking the amount "\$2,530.97" in line 5 of said paragraph and substituting therefor "\$20,590.66, plus \$400 per month for each month subsequent to December, 1954."

4. That plaintiff Richardson Vista Corporation's said complaint be supplemented in Paragraph (b) of the prayer for relief contained therein by striking the amount "\$2,530.97" contained in the third line thereof and substituting therefor "\$20,590.66, plus \$400 per month for each month subsequent to December, 1954."

Dated at Anchorage, Alaska, this 1st day of March, 1955.

HELLENTHAL,

HELLENTHAL & COTTIS,

By /s/ JOHN S. HELLENTHAL,

Attorneys for the Plaintiffs.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE

MARCH 18, 1955

Now at this time this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time pre-trial conference in cause No. A-7481, entitled Richardson Vista Corporation, a Washington corporation, and Panoramic View Corporation, a Washington corporation. Plaintiffs, versus City of Anchorage, a municipal corporation. Defendant, came on regularly before the Court. Richardson Vista Corporation represented by John Hellenthal and Ralph Cottis, of its counsel. Panoramic View Corporation represented by F. M. Reischling, of Seattle, Washington, and Albert Maffei, its counsel. City of Anchorage represented by John Radar, its counsel. The following proceedings were had, to wit:

Statement to the Court was had by John Radar, counsel for defendant.

Statement to the Court was had by John Hellen-thal, of counsel for Richardson Vista Corporation.

Statement to the Court was had by F. M. Reischling, of counsel for Panoramic View Corporation.

Statement to the Court was had by John Radar, of counsel for City of Anchorage.

There being no issues to simplify, amendments to pleadings, admissions of fact, or any other matter concerning which the respective counsel could stipulate, the conference was adjourned.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Plaintiff, Panoramic View Corporation, supplements complaint heretofore filed in the above-entitled action as follows:

1. That the following new paragraph be added following Paragraph VII(a) of said complaint.

(b) Panoramic View—(Buildings #20-33, inc.)

That during the calendar years of 1952, 1953, 1954 and 1955, plaintiff, Panoramic View Corporation, was billed monthly as if each of plaintiff's fourteen (14) buildings were separate customers of defendant. That during the period from September 1, 1951, through February, 1955, plaintiff, Pano-

ramic View Corporation, was billed for 861784 kilowatt hours as follows: 1951 (September-December) 90656; 1952—261352; 1953—248210; 1954—222826; 1955, January-February—38740; that defendant city billed Panoramic View Corporation for said total kilowatt hours in the total sum of \$49,737.12; that during the said entire period of time and for the total number of kilowatt hours hereinabove set forth Panoramic View Corporation was overcharged for said electrical power so consumed not less than \$14,436.27; that the total sum billed to and paid by Panoramic View Corporation for the power consumed as above set forth totaled \$49,737.12, which said sum is the total of the monthly bills tendered to and paid by Panoramic View Corporation under continuing protest to the City of Anchorage; plaintiff, Panoramic View Corporation, does not know the basis and/or rate schedule upon which the bills for power consumed by Panoramic View Corporation were determined by the City of Anchorage and alleges on information and belief, that in figuring and determining the amount due to the City for said power consumed, the City used an erroneous rate and/or did not give to plaintiff, Panoramic View Corporation, the most favorable rate to which it was entitled by reason of the quantity of power used and the similarity of service as rendered to other consumers of power; that in computing and billing Panoramic View Corporation the defendant City failed to take into account the fact that Panoramic View Corporation is a single customer and as such entitled to a rate figured upon the total quan-

tity of power consumed; that the defendant City is continuing to overcharge plaintiff, Panoramic View Corporation, and threatens to and will continue to so overcharge Panoramic View Corporation for power consumed in an amount and at a rate unknown to plaintiff, Panoramic View Corporation, but which plaintiff contends and alleges will not be less than 20 per cent more than it should be billed if the proper and most favorable rate to which Panoramic View Corporation is entitled was applied.

2. That Paragraph X of the plaintiffs', Panoramic View Corporation, complaint be supplemented by adding the following sentence thereto:

That plaintiff, Panoramic View Corporation's fourteen buildings were considered as fourteen individual customers of defendant during the calendar years of 1952, 1953, 1954 and 1955 and continues to be so considered; that in addition thereto the defendant City makes a separate and additional charge for the office of Panoramic View Corporation thereby constituting the Panoramic View Corporation company manager's office as an additional separate owner customer; that all of the power consumed by said office, together with all power consumed in said fourteen buildings, should be billed to Panoramic View Corporation as one single customer giving to Panoramic View Corporation the benefit of the declining rate in accordance with the amount of power consumed by said corporation.

3. That Paragraph XII of plaintiff, Panoramic View Corporation's, complaint be supplemented by striking the amount "\$1408.77" in line 6 of said paragraph and substituting in lieu thereof the sum of "\$14,436.27, subject to proper arithmetical computations on proper rates) per month for each month subsequent to December, 1954 * * *"

4. That plaintiff Panoramic View Corporation's said complaint be supplemented in Paragraph (b) of the prayer for relief contained therein by striking the amount "\$1,408.77" contained in the fifth line thereof and substituting therefor \$14,436.27, plus \$200.00 per month for each month subsequent to December, 1954."

Dated at Anchorage, Alaska, this 22nd day of March, 1955.

F. M. REISCHLING and
ALBERT MAFFEI,

Attorneys for Plaintiff, Panoramic View Corporation.

By /s/ F. M. REISCHLING,

By /s/ ALBERT MAFFEI.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

STIPULATION

Pre-trial conference having met on Friday, March 18, 1955, at 2 o'clock p.m., but having adjourned because of the inability of the defendant to participate therein by reason of the fact that its attorney was absent from Anchorage until the day before, and it being stipulated thereupon in open Court that the matters and things to be determined at said pre-trial conference be taken up subsequent thereto and settled by stipulation between the parties in the absence of the Court, said stipulation to be presented to the Court for the purpose of limiting issues at the trial of the above-entitled cause, and the parties having met by respective counsel and having stipulated to said matters contained in the pleadings in said cause,

Now, Therefore, it is hereby stipulated and agreed as follows:

I.

That Paragraphs I, II, IV, VII(a), VII(b) and XI (except for possible errors in arithmetical computations) of plaintiffs' complaint as supplemented by plaintiffs, be and the same hereby are admitted by the defendant and no evidence shall be introduced in support of the allegations in said paragraphs.

II.

That Paragraph III of plaintiffs' complaint be and the same is hereby admitted excepting that it

is understood and agreed that the last clause in said paragraph, commencing with the words "that the streets" and ending with the words "public generally" being the last two and one-quarter lines of said paragraph shall be deemed to be amended as follows:

"That since the inception of Panoramic View Corporation's and Richardson Vista Corporation's projects, the defendant by agreement with plaintiffs has asserted full jurisdiction over the streets and ways located in both projects; that formal dedication of said streets and ways in the case of Panoramic View Corporation's project was made in recent months; that formal dedication of the streets and ways in Richardson Vista Corporation's project is delayed pending approval by the military, though dedication in fact has been accomplished."

III.

That Paragraph V of plaintiffs' complaint shall be deemed to be amended to read as follows:

"That each of plaintiffs' projects is commercial establishments and uniformly used for apartment dwelling under uniform leases pursuant to FHA regulations which govern each project."

That defendant's answer to said paragraph shall be amended to admit the allegations therein and that no proof shall be necessary in aid of said allegation.

IV.

That Paragraph VIII shall be deemed to be amended by the insertion of the word "claimed" before the word "accordance" in line 1 thereof.

V.

That Paragraph IX be stricken and the following be substituted therefor:

"That at all times mentioned in plaintiffs' complaint and until July 1, 1954, the full complete rate schedule of defendant, promulgated, published and in effect, governing electric consumption of customers of the defendant, together with the conditions limiting and governing the furnishing of service is set forth in the attached Exhibit A; that on July 1, 1954, Exhibit A was amended by the attached Exhibit B; that on January 1, 1955, a new comprehensive and complete rate was promulgated, published and made effective by defendant, together with the terms and conditions of service, which is marked Exhibit C, all of which exhibits are incorporated herein as if set out in full in this complaint."

VI.

That Paragraph X as supplemented by each of plaintiffs is admitted except that for the words "Schedule 'C'" in line 10 thereof, there shall be substituted the following:

"the most favorable rate, which defendant contends is Schedule 'C,' as amended July 1, 1954, by Exhibit B."

VII.

That in Paragraph XII of plaintiffs' complaint, the words "commercial" in lines 2 and 4 be stricken and the words "most favorable" be substituted in each instance in lieu thereof, otherwise said paragraph is denied.

VIII.

That in line 3 of Paragraph XIII, the words "or the most favorable rate" be added thereto following the words "Schedule 'C,'" otherwise said paragraph is denied.

IX.

It is stipulated that all payments made by plaintiffs have been made under continuing protest, otherwise Paragraph XV is denied.

X.

No stipulations are made as to Paragraphs VI and XIV of plaintiffs' complaint.

XI.

That plaintiffs' prayer for relief as changed by supplemental complaints filed herein is further changed by substituting in the fourth line thereof the words "most favorable" for the word "commercial."

Dated at Anchorage, Alaska, this 22nd day of March, 1955.

HELLENTHAL,

HELLENTHAL & COTTIS,

Attorneys for Plaintiffs, Richardson Vista Corporation and Panoramic View Corporation,

By /s/ JOHN S. HELLENTHAL,

F. M. REISCHLING and
ALBERT MAFFEI,

Attorneys for Plaintiff, Pano-
ramic View Corporation,

By /s/ F. M. REISCHLING.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

NOTICE OF DEMAND TO PRODUCE

To the Defendant, City of Anchorage, and to John
Rader, Its Attorney:

You Are Hereby Given Notice that at the trial of
the above-entitled cause on Thursday, March 24,
1955, you are requested to produce the following
documents:

1. Original copies of City of Anchorage electri-
cal rate schedules in effect since January 1, 1951, to
date, including but not being limited to

- (a) Schedule in effect during 1951
- (b) Schedule in effect February, 1953
- (c) Schedule in effect July 1, 1954
- (d) Schedule in effect January 1, 1955
- (e) Schedule in effect February 10, 1955

together with the dates on which each of the above
schedules became effective.

2. All published rules and regulations pertaining to the furnishing of electrical energy by the City of Anchorage to its electrical customers, if any, other than those included in the tariffs referred to in Paragraph I above, in effect since January 1, 1951.

3. A letter addressed to Mayor, Members of the City Council, City Manager, City of Anchorage in re, "Electric power rates and meter deposits—Panoramic View and Richardson Vista projects," signed Anchorage Rental Service by Lela M. Hall, agent for Panoramic View and Richardson Vista projects, personally delivered to addressee on or about November 7, 1951, and which letter requested decision in connection with the problems therein presented be made at City Council meeting of November 9, 1951, together with copy of wire attached.

4. A copy of letter addressed by William H. McKinley, superintendent, electrical department, to National Fire Protection Association, 60 Battery March, Boston 10, Massachusetts, said letter being dated July 17, 1954, together with reply or replies thereto and additional correspondence, if any, in connection therewith.

5. Utilities payment bond furnished by Anchorage Rental Service as agent for Richardson Vista Corporation and the Panoramic View Corporation as principal to the City of Anchorage and dated approximately January, 1952, together with such additional surety bonds as may have thereafter been filed with the City of Anchorage pursuant to the requirement of said City by each of plaintiffs.

6. Minutes of council meeting of November 9, 1951, together with tape recording of proceedings.

7. Original of CAA contract No. C8ca-3782 with City of Anchorage dated April 6, 1951, together with all attached exhibits and changes thereto, plus any other contracts entered into by the City of Anchorage for sale of electric energy.

Dated at Anchorage, Alaska, this 23rd day of March, 1955.

HELLENTHAL, HELLEN-
THAL & COTTIS,

Attorneys for Plaintiffs, Richardson Vista Corpora-
tion and Panoramic View Corporation,

By /s/ JOHN S. HELLENTHAL.

F. M. REISCHLING and
ALBERT MAFFEI,

Attorneys for Plaintiff, Pan-
oramic View Corporation,

By /s/ F. M. REISCHLING.

Service of copy acknowledged.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

TRIAL BY COURT—MARCH 24, 1955

Now at this time, this cause coming on to be
heard before the Honorable George W. Folta, Dis-

trict Judge, the following proceedings were had, to wit:

Now at this time cause No. A-7481, entitled Richardson Vista Corporation, a Washington Corporation and Panoramic View Corporation, a Washington Corporation, plaintiffs, versus City of Anchorage, a municipal corporation, defendants, came on regularly for trial. Plaintiff Richardson Vista Corporation represented by John S. Hellenthal and Ralph H. Cottis of their counsel.

Plaintiff Panoramic View Corporation represented by F. M. Reischling and Albert Maffei of their counsel.

Defendant City of Anchorage represented by John Radar, City Attorney, the following proceedings were had, to wit:

John Hellenthal of counsel for plaintiff Richardson Vista moves the Court for a Pre-Trial conference.

Motion granted and at 10:30 o'clock a.m. Pre-Trial Conference commenced.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE—MARCH 24, 1955

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time cause No. A-7481, entitled

Richardson Vista Corporation, a Washington Corporation, and Panoramic View Corporation, a Washington Corporation, plaintiffs versus City of Anchorage, a municipal corporation, defendant, came on for Pre-Trial Conference. Came the respective parties and their respective counsel as heretofore, and the following proceedings were had, to wit:

John Radar, City Attorney for defendant City of Anchorage, moves Court for Jury Trial.

Argument on motion by John Hellenthal of counsel for plaintiff Richardson Vista Corporation.

Motion denied.

Electrical billing to Anchorage Rental Service for Panoramic View—house meters, duly offered marked and admitted defendants Exhibit A.

Electrical billing to Anchorage Rental Service for Richardson Vista—house meters duly offered marked and admitted defendants Exhibit B.

City of Anchorage, Alaska electric light and power service rates effective date January 1, 1951, duly offered marked and admitted defendants Exhibit C.

City of Anchorage, Alaska, electric light and power service rates published April, 1953, duly offered marked and admitted defendants Exhibit D.

City of Anchorage, Alaska, electric light and power service rates effective date July 1, 1954, duly offered marked and admitted defendants Exhibit E.

City of Anchorage, Alaska, electric light and power service rates effective date January 2, 1955,

duly offered marked and admitted defendants Exhibit F.

City of Anchorage, Alaska, electric light and power service rates effective date February 10, 1955, duly offered marked and admitted defendants Exhibit G.

Diagram of Richardson Vista and Panoramic View duly offered marked and admitted defendants Exhibit H.

At 11:50 o'clock a.m. Court continued Pre-Trial Conference to 2:00 o'clock p.m.

2:00 P.M.

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time came the respective parties and their respective counsel as heretofore and Pre-Trial Conference in cause No. A-7481, entitled Richardson Vista Corporation, a Washington Corporation and Panoramic View Corporation, a Washington Corporation, plaintiffs versus City of Anchorage, a municipal corporation, was continued. The following proceedings were had, to wit:

John Hellenthal counsel for plaintiff Richardson Vista moves court to amend complaint by adding the word claimed before accordance.

Motion granted.

John Hellenthal of counsel for plaintiff Richardson Vista, moves the Court to amend complaint.

Motion granted.

John Hellenthal of counsel for plaintiff Richardson Vista moves the Court to amend prayer of complaint by changing the word Commercial to most favorable.

Motion granted.

City of Anchorage Ordinance No. 55 duly offered marked and admitted defendants Exhibit I.

Letter from Anchorage Rental Service to City of Anchorage duly offered marked and admitted plaintiffs Exhibit #I.

National Electrical Code dated 1953 duly offered marked and admitted defendants Exhibit J.

At 3:00 o'clock p.m. Court continued cause to 3:12 o'clock p.m.

3:12 P.M.

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time came the respective parties and their respective counsel as heretofore and Pre-Trial Conference in cause No. A-7481, entitled Richardson Vista Corporation, a Washington Corporation, and Panoramic View Corporation, a Washington Corporation, plaintiffs, versus City of Anchorage, a municipal corporation, was continued. The following proceedings were had, to wit:

Copy of minutes of a special meeting of the city counsel held on November 9, 1951 at 8:00 o'clock

p.m. duly offered marked and admitted defendants Exhibit #K.

Invitation, Bid and Award (Supply Contract) issued by Civil Aeronautics Administration together with a map of real estate data, Anchorage International Airport, duly offered marked and admitted defendants Exhibit L.

At this time (3:45 p.m.) on inquiry of Court, parties reported no further matters for consideration at Pre-Trial Conference.

Thereupon Court directed that Trial by Court be resumed.

[Title of District Court and Cause.]

TRIAL BY COURT—MARCH 28, 1955

Now at this time this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now came the respective parties and their respective counsel as heretofore and the trial of cause No. A-7481, entitled, Richardson Vista Corporation, a Washington corporation and Panoramic View Corporation, a Washington corporation, plaintiffs, versus City of Anchorage, a municipal corporation, defendant, was resumed.

Plaintiffs rest.

John Radar, City Attorney for the defendant City of Anchorage, moves the Court to dismiss the plaintiffs complaint.

Argument on motion by John Radar, City Attorney for the defendant City of Anchorage.

At 3:05 o'clock p.m. Court continued cause to 3:15 o'clock p.m.

3:15 P.M.

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now came the respective parties and their respective counsel as heretofore and the trial of cause No. A-7481, entitled Richardson Vista Corporation, a Washington corporation and Panoramic View Corporation, a Washington corporation, versus City of Anchorage, a municipal corporation, defendant, was resumed.

Argument on motion to dismiss by F. M. Reischling, counsel for plaintiff Panoramic View.

Argument on motion to dismiss by Ralph Cottis of counsel for plaintiff Richardson Vista.

Argument on motion to dismiss by John Radar, attorney for defendant City of Anchorage.

Motion denied.

George W. Nichols, being first duly sworn testified for and in behalf of the defendant.

At 5:00 o'clock p.m. Court continued cause to 10:00 o'clock a.m. of Tuesday, March 29, 1955.

[Title of District Court and Cause.]

OPINION

Plaintiffs, owners of housing projects comprising 19 and 14 apartment buildings respectively, on two unsubdivided tracts within the City of Anchorage, seek to recover approximately \$40,000 in alleged overpayments for electricity supplied for such facilities and places in each building as are used exclusively by the plaintiffs or provided for the use of their tenants in common, and measured by a meter in each building. In the application of rates and in billing for the current consumed, the City treated each building as if it were separately owned. The plaintiffs contend that each housing project should be treated as a single customer, the meter readings combined, and the rate applicable to the total energy used, applied. The City contends that the installation and maintenance of a separate service drop and meter at each building warrant the classification made and points to the fact that all identical housing projects, as well as more than 200 multi-meter consumers within its corporate limits, are similarly dealt with.

Manifestly, if the City's position is untenable, the recovery of overcharges by all these consumers might well have disastrous consequences. The trial, which was to the Court, was somewhat protracted and marked by vehemence and indigation, affected or genuine, and the briefs, aggregating 135 pages, are of like tenor, but as I view the case, out of the

welter of contentions only two questions emerge, (1) whether a housing project consisting of several buildings erected on one tract of land and owned by one person is an "establishment" within the meaning of Schedule (C) of the City's rate tariffs, and (2) if so, whether the practice of the City in refusing to combine meter readings is in conflict with the schedule.

It appears that before these housing projects had been completed in 1951, the plaintiffs discussed the matter of rates with some of the officials of the City with the view of obtaining the benefit of conjunctive billing. Apparently all the parties thought ordinance No. 55 was still in effect. It provided that "in no event would separate premises, even though owned by the same consumer, be supplied with electricity through the same meter or meters" and expressly prohibited combined meter readings "except where the City, for its own convenience, installed more than one meter." The sections containing these provisions had, however, been repealed on August 24, 1949, by ordinance No. 283, without a reenactment of these provisions. Sec. 602.1 of that ordinance empowers the City Manager to make and publish rates and charges for electrical energy and service, and Sec. 608.1 provided that

"The City Manager, with the approval of the City Council, may adopt and promulgate such rules and regulations as may be necessary pertaining to the supplying and discontinuance of electric service to all consumers, including but

not being limited to rates, charges for connecting and disconnecting service, separate meters for separate premises* * *”

Effective January 1, 1951, the City promulgated rate tariffs, the following schedule of which is applicable to this controversy:

Schedule (C) Commercial Rate

This service applicable to single phase service for lighting, cooking, small appliances and incidental single phase motors not in excess of five (5) horsepower, in professional, mercantile, industrial and other establishments not classed as single family residences.

| | |
|----------------------|-----|
| First 25 KWHrs..... | 10c |
| Next 50 KWHrs | 8c |
| Next 50 KWHrs..... | 7c |
| Next 1000 KWHrs..... | 6c |
| Next 1000 KWHrs..... | 5c |
| Excess KWHrs | 4c |

It was in this setting that the plaintiffs presented their demand for conjunctive billing to the City Council. Although it may be inferred from the testimony that the repeal of the provisions of ordinance No. 55 was inadvertent and that the City Council and officials were ignorant thereof, the reason stated in the minutes of the meeting of the City Council of November 9, 1951, defendant's Exhibit K, at which the plaintiffs' demand was denied, that to grant the demand "would alter the established policy of billing for each individual building and would also

affect many others who own more than one building and are billed on a separate unit basis” would appear to indicate knowledge of the repeal. Thereafter the plaintiffs paid their bills under protest, according to Schedule (C), which survived successive revisions until the sweeping revision of January 2, 1955.

It is conceded that after ordinance No. 283 became effective no rule or regulation was adopted prohibiting conjunctive billing and plaintiffs argue that in the absence of such a rule or regulation the practice referred to was unauthorized because of Sec. 49-1-3 of the Code governing public utilities generally. I am of the opinion, however, that the language of that section clearly shows that it was not intended to apply to municipalities.

Since it can hardly be disputed that the plaintiffs' housing projects are “establishments” within the meaning of Schedule (C), the crucial questions are (1) whether the refusal of the City Council to grant the request for combining meter readings is equivalent to an authorization or ratification of the practice referred to, and, (2) if so, whether the practice conflicts with Schedule (C). Since the language of Sec. 602.1 of ordinance No. 283 is merely permissive and the Court has already held that Sec. 49-1-3 of the Code does not apply, it follows that the City was not required to make such a practice the subject of a rule or regulation. However, Schedule (C) necessarily implies that an “establishment” is entitled to the benefits of the sliding scale of rates, whereas the

construction placed upon this schedule by the City is that such an "establishment" is entitled to this benefit only if the service is of the 1-point variety. While this classification could hardly be said to be unreasonable, and therefore invalid, yet, since it effectually excluded any establishment consisting of more than one building from the benefits of lower rates for increased consumption, I am of the opinion that it was in conflict with Schedule (C) except where multiple meters were installed at the request of the consumer.

Judgment may be presented in accordance herewith.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter came on for trial before the Honorable George W. Folta, District Judge, without a jury, at Anchorage, Alaska, on March 24, 1955. The trial continued through March 29, 1955. Plaintiff Richardson Vista Corporation was present by its attorneys John S. Hellenthal and Ralph H. Cottis; plaintiff Panoramic View Corporation was represented by its attorneys John S. Hellenthal, Ralph H.

Cottis and F. M. Reischling, the latter having associated Albert Maffei with himself. The defendant was present by its attorney John L. Rader. A pre-trial conference having been held to narrow the issues, testimony was adduced on behalf of all parties, exhibits introduced, briefs filed and the matter having been taken under advisement, the Court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiffs are Washington corporations and have fully complied with the laws of Alaska relating to corporations of their classification.

2. Defendant is a municipal corporation existing under the laws of Alaska.

3. Each of plaintiffs owns several apartment buildings within the City of Anchorage located on similar unsubdivided contiguous tracts, each of which buildings contains several apartments.

4. Defendant has supplied and is supplying electricity to plaintiffs' apartment house establishments commercially. During the period from initial occupancy of the establishments to the time of trial, defendant applied its rate schedules for electricity consumed by each of plaintiffs as if the separate buildings within each establishment were a separate customer. This method of charging plaintiffs resulted in higher bills and payments than would have been the case if the charges were made with one application of the rate to each establishment each month.

5. During such period, the defendant had in effect rate schedules of which Schedule "C" applied to commercial establishments such as plaintiffs. Defendant had no applicable rules or regulations in effect other than those set forth in Schedule "C."

6. All payments by plaintiffs were made under protest.

7. Each of plaintiffs' apartment buildings had its own set of meters; one of said meters was used to measure consumption of house current within the building; and the other meters were used for measuring consumption of current by the tenants in each apartment; said tenants have been billed directly by defendant. The method of delivering electricity to each apartment house with separate meters for the apartments and a separate meter for the "house" was the most feasible method by which the City could connect its distribution system to the various buildings within each establishment.

8. Plaintiffs protested the application of the electrical rates promptly to the governing body of the defendant, namely, its city council, and have exhausted all administrative remedies with respect thereto.

9. No portion of the amounts paid by plaintiffs for electricity consumed for "house" purposes has been repaid to them.

10. Defendant had threatened and indicated that the defendant would continue to treat each building in each establishment as a separate customer.

From the foregoing facts, the Court concludes the law to be as follows:

Conclusions of Law

1. The apartment buildings within each of plaintiffs' projects constituted commercial establishments within the meaning of the applicable rate schedule promulgated by defendant.

2. Each of plaintiffs was entitled to one application of the schedule in computing the charges to be paid defendant for current consumed by the "house."

3. Defendant's failure to make one application of the rate schedule to each establishment was unlawful.

4. Plaintiffs are entitled to recover the difference between the amounts paid by them and the amounts which should have been paid had the rate schedule been applied once to each establishment; together with interest from the date of each overpayment computed at six per cent per annum, its costs, and attorneys' fees in the amount of

5. Plaintiffs are entitled to an injunction restraining defendant from applying its rate schedule separate to each building within each establishment; and to an order requiring defendant to repay plaintiffs the amounts of overcharges as computed in accordance with the foregoing, together with costs and attorneys' fees.

6. Plaintiffs have no adequate remedy at law.

Dated at Anchorage, Alaska, this 27th day of May, 1955.

Respectfully submitted,

HELLENTHAL, HELLEN-
THAL & COTTIS,

Attorneys for Plaintiffs Richardson Vista Corpora-
tion and Panoramic View Corporation,

By /s/ RALPH H. COTTIS.

.....,
District Judge.

Receipt of copy acknowledged.

[Endorsed] Filed May 27, 1955.

[Title of District Court and Cause.]

HEARING ON OBJECTIONS TO FINDINGS
OF FACT AND CONCLUSIONS OF LAW
AND JUDGMENT—JUNE 17, 1955

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge the following proceedings were had, to wit:

Now at this time hearing on objections to Findings of Fact and Conclusions of Law and Judgment in cause No. A-7481, entitled Richardson Vista Corporation, a Washington corporation, and Panoramic

View Corporation, a Washington Corporation, Plaintiffs, versus City of Anchorage, a municipal corporation, Defendant, came on regularly before the Court, John S. Hellenthal and Ralph H. Cottis, appearing for plaintiff Richardson Vista Corporation; Albert Maffei and F. M. Reischling appearing for plaintiff Panoramic View Corporation, and John Rader, for defendant. The following proceedings were had, to wit:

Argument to the Court was had by F. M. Reischling, for and in behalf of the plaintiff Panoramic View Corporation.

Argument to the Court was had by John Rader, for and in behalf of the defendant.

Argument to the Court was had by Ralph H. Cottis, for and in behalf of the plaintiff Richardson Vista Corporation.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises requests respective counsel to confer and attempt an agreement as to form of decree.

In the District Court for the Territory of Alaska,
Third Division

No. A-7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Cor-
poration,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Defendant.

JUDGMENT AND DECREE

This matter having been brought on regularly for hearing this 17th day of June, 1955, before the undersigned judge of the above-entitled Court on the motion of the plaintiff, Panoramic View Corporation for judgment, plaintiff appearing by its counsel, F. M. Reischling of Seattle and Albert Maffei of Anchorage, Alaska; Plaintiff, Richardson Vista, also appearing and presenting its motion for judgment by attorneys, John S. Hellenthal and Ralph H. Cottis; the defendant, City of Anchorage, appearing by John L. Rader, City attorney; the matter having been argued and submitted to this Court and the Court having jurisdiction of said matter, and it appearing to the Court that the above-entitled cause was brought on regularly for trial before the Honorable George W. Folta, District Judge, without a jury, at Anchorage, Alaska, on

March 24, 1955, said trial continuing through March 29, 1955; that the parties were represented at said trial by counsel hereinabove named and it further appearing to the Court that witnesses were sworn, testimony adduced by said parties, exhibits introduced and that plaintiff, Panoramic View Corporation filed briefs in support of its position and in answer to the defendant's brief, and the Court having taken the matter under advisement, and having on May 25, 1955, signed and filed a written opinion and decision holding for plaintiffs, copies of which opinion were mailed to respective counsel for the parties by the office of said District Judge, and it further appearing to the Court that the Honorable George W. Folta died thereafter and before entering a formal judgment in accordance with his filed opinion, and it further appearing to this Court that in his filed opinion the trial Court found that the defendant City in its application of its published rates for consumption of electrical power by its customers deprived and denied to plaintiff the benefits of the published schedule and treated plaintiff, Panoramic View's apartment project, consisting of fourteen buildings, as though it were fourteen separate and distinct owner customers, notwithstanding the fact that the said fourteen buildings were erected on one tract of land, owned by one person, and operated as a single business, and that defendant's act of refusing to combine the electric meter readings of the said fourteen buildings is in conflict with the defendant City's published Schedule "C," which provides in effect that "estab-

lishments'' are entitled to the benefit of a declining rate based upon increasing consumption; and the trial Court having further found that plaintiff, Panoramic View's apartment housing project is an "establishment" within the meaning of defendant **City's published and applicable rate Schedule "C"** and the trial Court having further found that the plaintiff had paid under protest to the City, its light bills which did not conform to the published schedule and the amounts of which were in excess of the amount that the defendant City could have properly charged under said published rate Schedule "C" and the trial Court having concluded from said Findings of Fact that plaintiff is entitled to judgment as prayed for, and it therefore appearing to this Court that the entry of a formal judgment on the findings of the trial Court as contained in his opinion and decision is the exercise of a proper ministerial power under the circumstances, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Panoramic View Corporation, do have and recover judgment against the defendant City for the difference between the amount which it has paid to defendant for electric power and the amount which should have been paid to defendant, had defendant's promulgated and published rate schedule been properly applied to plaintiff Panoramic View's apartment establishment, and it is further

Ordered, Adjudged and Decreed that defendant pay to Panoramic View Corporation interest at the

legal rate from date of each overpayment upon the amount of such overpayment. and it is further

Ordered, Adjudged and Decreed that defendant be, and it hereby is, restrained and enjoined from applying any rate schedule to plaintiff Panoramic View's establishment not based upon a proper, reasonable, and substantial classification and in accordance with a promulgated and published schedule of rates, and it is further

Ordered, Adjudged and Decreed that plaintiff shall have judgment for its costs and disbursements herein to be taxed, together with attorney's fees in the sum of \$480.00.

Done in Open Court this 21st day of June, 1955.

/s/ J. L. McCARREY, Jr.,
District Judge.

Presented by:

/s/ ALBERT MAFFEI,
Of Counsel for Panoramic
View Corporation.

Due and timely service of copy of plaintiff Panoramic View's original proposed judgment and decree admitted this 16th day of June, 1955.

/s/ JOHN L. RADER,
Counsel for Defendant.

/s/ JOHN S. HELLENTHAL,
Counsel for Plaintiff,
Richardson Vista.

[Words “and Plaintiff Panoramic View Corporation” added again by John S. Hellenthal (after being ruled out by F. M. Reischling) at the request of Court, June 21, 1955.]

/s/ J. S. HELLENTHAL.

[Endorsed]: Filed and entered June 21, 1955.

In the United States District Court for the District
of Alaska, Division Number Three at Anchorage

No. A-7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Corporation,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corporation,

Defendant.

DECREE

This Matter came on for trial before the Honorable George W. Folta, District Judge, without a jury, at Anchorage, Alaska, on March 24, 1955. The trial continued through March 29, 1955. Plaintiffs were represented by attorneys John S. Hellenthal and Ralph H. Cottis of the firm of Hellenthal, Hellenthal & Cottis, of Anchorage, Alaska, and plaintiff Panoramic View Corporation by F. M. Reisch-

ling of Seattle, Washington, and Albert Maffei of Anchorage, Alaska. Defendant was present by its attorneys, John L. Rader. A pre-trial conference was held to narrow the issues; testimony was adduced on behalf of the parties; exhibits were introduced; briefs were filed; the matter was taken under advisement; a written opinion was filed by the trial judge, the Honorable George W. Folta, on May 25, 1955, wherein the findings of fact and conclusions of law are evident and definitive; proposed findings of fact and conclusions of law, submitted by plaintiffs and incorporating the findings and conclusions inherent in the opinion, were not acted upon because of the untimely death of the Honorable George W. Folta. It appearing to the undersigned judge, regularly sitting in the Court in which the action was tried, that the written opinion of May 25, 1955, sufficiently establishes the findings of fact and conclusions of law of the Court,

Now Therefore, on motion of Hellenthal, Hellenthal & Cottis, it is

Ordered, Adjudged and Decreed that defendant pay to plaintiff Richardson Vista Corporation the difference between the amount heretofore paid by plaintiff Richardson Vista Corporation to defendant and the amounts which should have been paid by plaintiff Richardson Vista Corporation had defendant's rate schedule been applied once to its establishment and it is further

Ordered, Adjudged and Decreed that defendant pay to plaintiff Richardson Vista Corporation inter-

est from the date of each overpayment computed at six per cent per annum upon the amount of such overpayment and it is further

Ordered, Adjudged and Decreed that defendant be, and it hereby is, restrained from applying its rate schedules separately to each building within the establishment owned by plaintiff Richardson Vista Corporation unless such practice be sanctioned by duly promulgated and legally sufficient ordinance or regulation and it is further

Ordered, Adjudged and Decreed that defendant pay to plaintiff Richardson Vista Corporation its costs as taxed by the Clerk of this Court and a sum to apply upon its attorneys' fees in the amount of \$720.00.

Dated at Anchorage, Alaska, this 21st day of June, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed and Entered June 21, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the City of Anchorage, defendant herein, by and through its attorney, John L. Rader, and moves the Court for a new trial of the above-entitled matter for the following reasons:

1. Defendant was deprived of its right to a trial by jury of all issues so triable.
2. The judgment of the Court is contrary to the law.
3. The judgment of the Court is contrary to the evidence.
4. The judgment of the Court is contrary to the weight of evidence.
5. There is no sufficient or substantial evidence tending to support the Opinion, Judgment and Decree entered herein.
6. The judgment of the Court and the Memorandum Opinion, upon which said judgment is predicated, does not find sufficient facts nor contain sufficient conclusions of law.
7. The Decree and Judgments as entered herein do not conform to the Memorandum Opinion and the Findings of Fact and Conclusions of Law stated in the same.
8. The Decree and Judgment as entered and the Memorandum Opinion are not definite enough to dispose of the issues in controversy between the parties in this cause.
9. The Court erred in denying defendant's motion to direct a verdict in its favor at the close of plaintiffs' case.
10. The Memorandum Opinion and the Decree and Judgment entered thereon are not sufficiently

clear and definite to apply the doctrines of estoppel and res judicata to future cases and controversies.

11. The Memorandum Opinion filed by the Honorable George W. Folta, deceased, is not sufficient in findings of fact and conclusions of law to enter a decree on the same.

Dated at Anchorage, Alaska, the 30th day of June, 1955.

/s/ JOHN L. RADER,

Attorney for the City of Anchorage, Defendant
Herein.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

ORDER

This matter of defendant's motion for a new trial having been brought on regularly for hearing this 26th day of August, 1955, before the undersigned judge of the above-entitled Court; plaintiff, Richardson Vista appearing by it's counsel of record, Hellenthal, Hellenthal and Cottis; Panoramic View Corporation appearing by it's counsel of record F. M. Reischling and Albert Maffei; the defendant, City of Anchorage, appearing by it's counsel of record, John L. Rader. The matter having been

fully argued to the Court and the briefs having been submitted and the defendant, City of Anchorage, having submitted without argument Section 2 through 11 inclusive of its motion and the Court being of the opinion that said motion is not well taken and that said motion for new trial should be denied, Now Therefore,

It Is Hereby Ordered, Adjudged and Decreed that defendant, City's motion for a new trial be and the same is hereby denied.

/s/ J. L. McCARREY, JR.,
Judge of District Court.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed August 31, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant, City of Anchorage, a municipal corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgments and decrees entered in this matter on or about the 21st day of June, 1955, and also the order of the Court denying defendant's motion for new trial on or about August 26, 1955.

Appellant hereby gives notice of appeal of all orders relative to the foregoing entered on behalf of either one or both of plaintiff corporations.

Dated at Anchorage, Alaska, the 6th day of September, 1955.

/s/ JOHN L. RADER,
Attorney for Appellant,
City of Anchorage.

Receipt of Copy Acknowledged.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

ORDER GRANTING EXTENSION OF TIME
IN WHICH TO DOCKET AND FILE THE
RECORD ON APPEAL

This matter having come on regularly for hearing on the 14th day of October, 1955, and the plaintiffs appearing through their counsel, Hellenthal, Hellenthal & Cottis and Albert Maffei, and the defendant appearing through its counsel, John L. Rader, and the Court having considered the motion of defendant for an extension of time in which to file and docket the record on appeal, and no objection having been made by plaintiffs or either of them,

Now, therefore, it is hereby ordered that the time for docketing the record on appeal is hereby extended to the 6th day of December, 1955.

Dated at Anchorage, Alaska, the 14th day of October, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed and Entered October 14, 1955.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF
ATTORNEYS

Comes now John L. Rader, Attorney for the City of Anchorage, and moves the Court for an order substituting Lynn W. Kirkland as City Attorney and as attorney in this cause. This motion is based upon the fact that the undersigned has resigned as attorney for the City of Anchorage and Lynn W. Kirkland has been appointed City Attorney by the City Council.

Dated at Anchorage, Alaska, the 28th day of November, 1955.

/s/ JOHN L. RADER,
Attorney for the
City of Anchorage.

ORDER SUBSTITUTING ATTORNEYS

This matter having come on for hearing upon the motion of John L. Rader and the Court being fully advised in the premises,

It Is Ordered that the substitution above moved for be, and the same is, hereby made.

Dated at Anchorage, Alaska, the 2nd day of December, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered December 2, 1955.

In the District Court for the District of Alaska,
Third Division
No. A-7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Cor-
poration,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Defendant.

Before: The Honorable George W. Folta, U. S. Dis-
trict Judge.

PROCEEDINGS

March 18, 1955—2:00 P.M.

Appearances:

For the Plaintiffs, Richardson Vista Corporation and Panoramic View Corporation:

JOHN S. HELLENTHAL,

RALPH H. COTTIS,

Attorneys at Law.

For the Plaintiff, Panoramic View Corporation:

F. M. REISCHLING,

Attorney at Law.

ALBERT MAFFEI,

Attorney at Law.

For the Defendant:

JOHN L. RADER,

City Attorney.

The Court: Well, have the counsel conferred among themselves to see if they can agree on the disposition of some of the issues?

Mr. Rader: If it please the Court, I did talk to Mr. Reischling yesterday. I want it to appear in the record I arrived back from San Francisco Wednesday night and Mr. Reischling and I had tentatively agreed among ourselves we would get together Monday and attempt to work out our differences in billing and that type of thing. I also called

Mr. Hellenthal about it in the hope that we could do the same thing at that time. I had understood until this morning that the pre-trial conference would be next Tuesday and consequently I am very ill prepared at this moment to make the stipulations that I think can be made in this case.

The Court: The Court is not going to be here Tuesday. That is why it was changed to today.

Mr. Rader: I don't doubt but what there was good reason for changing it, but in a matter of the few hours it makes it difficult if not impossible for me. I am not trying to delay nor am I trying to be obstinate. It is just the fact I am ignorant.

The Court: Why didn't you disclose your ignorance to my secretary this morning?

Mr. Rader: If the Court please, I had rather disclose my ignorance to you than to your secretary.

The Court: I thought you might have on account of your [5*] recent return and perhaps lack of opportunity and I asked her when I got back in the office whether you had objected to it or indicated you were unprepared and she said no. Otherwise, we wouldn't be here if you had.

Mr. Rader: Well, it is my understanding that the plaintiffs have some differences among themselves. I didn't wish to stand in their way. I don't know if they have any differences themselves to settle or not, but if they do there is no reason for them not having a pre-trial conference. It doesn't necessarily have to be a 3-way pre-trial conference.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: There is not much purpose served in having a pre-trial conference limited to the plaintiffs without having everybody here.

Mr. Hellenthal: I can assure Your Honor there is no need for a pre-trial conference, as counsel suggests, among the plaintiffs.

Mr. Rader: That is fine then.

Mr. Hellenthal: I don't quite understand what he is talking about.

The Court: You mean there is no great difficulties between you?

Mr. Hellenthal: None that I know of.

The Court: That is, between the plaintiffs?

Mr. Hellenthal: Yes.

The Court: If that is the situation I don't know why we [6] should tarry any longer here.

Mr. Rader: If it please the Court, what is the arrangement now going to be as to the tentative trial date on this case? I understand the plaintiffs have witnesses they wish to bring up from the States and it may be that I will also.

The Court: I went up on a wild-goose chase to Fairbanks. They never notified me that the case on trial was in progress or would not be concluded for another couple of days until after I got up there, so that requires my return to Fairbanks Monday morning and it means that everything on the calendar will have to be postponed about 3 days.

Mr. Rader: Would that mean we would reasonably expect this case to go to trial a week from Monday?

The Court: What is next Monday?

Mr. Rader: A week from Monday would be the 28th. That would be a 3-day delay.

The Court: Without the calendar I don't know if this is the next case on the calendar.

Mr. Hellenthal: Your Honor, this case is set for trial on the 23rd.

The Court: I know that. There is no use of reminding me of that. What is the next case is all I am interested in now.

Mr. Hellenthal: As I told Your Honor this morning on the telephone we have witnesses now that expect to arrive Monday. They anticipate being here Monday for a pre-trial conference [7] Tuesday and the trial on Wednesday. According to our discussion this morning the trial would be held on Thursday or 24 hours one way or the other from 10:00 o'clock Thursday morning and we, of course, have to adjust our schedules and bring these witnesses up here so I would like to urge that when the date is established that it be at an early date because my people have to adjust their schedules accordingly, some may come from New York, and that you try to set it as soon as possible so that we won't waste too much time and money in connection with it, although I realize there are other considerations.

The Court: I don't think I am able to answer the question that I myself have raised as to when this case is set for trial. If it is the next case that is set for trial on the calendar it will come up in the regular course of business, I presume 10:00 o'clock Thursday morning. It could possibly be

earlier than that, but it wouldn't be more than 12 or 24 hours earlier and it could conceivably be later, but without having my calendar I can't tell you. I assume that this case is the next case set for trial.

Mr. Cottis: Could we get your calendar for you, Your Honor?

The Court: Well, I think probably all we need to do is you might call my secretary and ask her if this case is the next case on the calendar for trial.

Mr. Cottis: If the Court please, do I understand because [8] of the City's admitted ignorance we are not going ahead with the pre-trial conference; we are not going to try to limit the issues at this time?

The Court: Well, it would have to be a one-sided thing.

Mr. Cottis: You just don't think you can do it?

Mr. Rader: If it please the Court, there is one thing that is pretty important that I think we can agree on now which will save substantial time in the preparation of this matter and that is that the plaintiffs allege a certain rate schedule was applied erroneously by the City of Anchorage. Now, the plaintiffs have amended their complaint to bring the time down from 1952 to the present date. I think that they have failed to take into consideration rate changes since that time and rate regulations which are different than those as alleged in their pleadings. However, if we do go into that I think we are going to be trying about four different cases that will all be a little bit different and I don't believe that on any of them they need litigation after we establish probably the one basic fact. On the orig-

inal complaint and the regulations that existed as of that time, which we have admitted, if we have to bring it down to date through regulation changes and rate changes it will be rather difficult. Now, unless I am mistaken I think that the plaintiffs, and I think I am prepared, at least I'd like to sound you out on this, to try the case on the basis of the original regulations and the original rates. The difference will be, as I understand it, on whether or [9] not you should have 1 meter or 30 meters. If it is established in that case that you should have 1 meter then it is a matter, I believe, of probably mathematical computation to bring it down to date, but if they have anything else in mind besides that, why, then I would have to in my answer deny the regulations and bring in a lot of others which would really complicate the case.

Mr. Cottis: I think the whole essence of the thing is whether each of the plaintiffs is a single customer or whether they are as many customers as each of them owns buildings, and that certainly is the issue. The rest of it is arithmetic.

Mr. Rader: I believe it is, but I didn't know for sure that was your feeling also.

The Court: If that is the case I suppose that a pre-trial conference would in no event accomplish anything since, if that is what you call the basic fact, I hardly suspect that you could agree on it.

Mr. Rader: I think that that fact, if we can eliminate all the other factors and there are a good many additional facts alleged, I believe, frankly,

before trial time I will be able to agree with counsel on practically all of these side issues that we have and if it will remain with just that one basic issue I believe, but at this time I am unable to state that. Frankly, I just haven't had a chance to check all the side issues.

The Court: That appears to be just a question of construing the ordinance. [10]

Mr. Rader: Actually, I don't believe it is. It will be a question of commonlaw application, I believe, as applied to utility regulations. There may be a statutory problem involved in the thing too.

The Court: Well, will it require adducing evidence?

Mr. Rader: I believe it will, yes, Your Honor. There is a charge that we treat this establishment and these consumers, these plaintiffs, different than other similarly situated consumers. I assume that they intend to produce evidence that there is discrimination there. They also charge that the City made representations to them that they would receive certain preferential treatment which we have denied and I assume that they will produce evidence on that. I assume that they may also produce evidence by expert witnesses as to whether or not the classification made by the City is reasonable and is one customarily made in utility regulations and rate findings. By the same token I assume we will probably produce our own expert witnesses as to that point, but I believe that will be about the essence of the case. If counsel has any other ideas I would appreciate hearing it, but that is the way I view the case.

Mr. Reischling: If the Court please, it was my idea that this pre-trial conference would be held to limiting the issues to the pleadings of the case and, of course, that counsel would stipulate to the truth of certain of plaintiffs allegations so that we would not have to go forward with evidence to prove [11] things that had been admitted by this pre-trial conference and I am in accord generally, I believe, with what counsel has said. It is our purpose to limit the issues. There may be some matters in which evidence may be introduced that we will offer, but I see no reason why, if we cannot have a pre-trial conference today, that we could not by agreement perhaps stipulate to certain things so we can limit the issues as of the time that the trial commences so that the time consumed in the trying of the case can be reduced to the extent that they have agreed upon, matters that have been contained in the pleadings.

The Court: Well, you can stipulate all you want, and, of course, you should do that if you can agree on any of these matters, but at least you wouldn't require the Court to take any action on those other than to recognize the stipulation, which the Court will do unless you attempt to stipulate on matters of law. Then it will probably be reached about the 28th.

Mr. Cottis: The 28th, a week from Monday.

The Court: No, I mentioned next Thursday. I don't know. I haven't got the calendar here.

Mr. Hellenthal: Can I go get the calendar?

The Court: Then, will it go approximately to the 24th; it wouldn't be far off from that?

Mr. Hellenthal: And Your Honor, we will go, as I understand Your Honor to state this morning that in case we do get started Thursday, which appears to be a likelihood that we will, [12] that we estimate the case will take about 2 days, that Your Honor will be willing to hold a Saturday morning session if necessary?

The Court: Well, what is the reason for that?

Mr. Hellenthal: For the reason that I stated this morning, that I have these witnesses coming from out of town and I hesitate to keep them all during the week end if it can be avoided.

Mr. Rader: If it please the Court, because of the fact we have so many out of town people coming on this thing, unless it would too seriously inconvenience the Court, I know it would be greatly to my convenience to have it start Monday morning at a time certain and continue until concluded. That would be a week from Monday. It is of enough importance that our witnesses from the States and our expert testimony will be expensive and which will of necessity have to be employed from the States that we not be jeopardized too closely and have it drag out over a week end which it is almost certain to do, it appears to me, if we don't start until Thursday or maybe Friday.

The Court: Well, I have had my calendar disarranged too many times now on account of this Fairbanks case that it has resulted in great inconvenience to litigants as well as to the Court and I

don't feel like putting any case over beyond the date that has been finally set for trial.

Mr. Rader: Well, that was my reason. This is the time we are finally setting it for trial and I thought that this would be a proper time to request that change. [13]

The Court: Well, but that doesn't take into consideration the fact that I have several days in which I have been called on to further disrupt or disarrange the calendar in order to get some case started next Thursday which may run beyond next Monday.

Mr. Reischling: If the Court please, for the record I too want to resist any further continuation on the ground that I missed a motion made for a continuance of this case and it was set for the 23rd of this month. I have a case I am supposed to be in Seattle to try on the 30th, and I had one that I had to try on the 22nd or rather Tuesday of this week, therefore, if the Court will start the case at the earliest possible moment that will, of course, be in accord with the setting which the Court has heretofore given to this case and which will much more suit my convenience.

The Court: I have just indicated that is what the Court would do. I suppose there is nothing further then to call to the attention of the Court at this time. If not, it should be understood that the case will start on the 28th with the possibility that it may be one day later—I mean the 24th. If there is nothing further we will adjourn this Court until Thursday morning.

(Thereupon, at 2:23 o'clock p.m., Court was adjourned to Thursday, March 24, 1955, at the hour of 10:00 o'clock a.m.) [14]

The Court: I assume the parties are ready for trial this morning.

Mr. Rader: Ready, Your Honor.

The Court: You may make your opening statement.

Mr. Hellenthal: Your Honor, we should like to request at this time that in order to simplify the facts to be presented that we hold a pre-trial conference which I think should take not more than 20 minutes to a half hour and which should save perhaps a half a day of testimony.

The Court: I thought you were engaged in doing that the last several days.

Mr. Hellenthal: Your Honor, you will recall that originally the pre-trial conference in this matter was scheduled on the 22nd of March, then the pre-trial conference instead was scheduled for 2:00 o'clock on the 18th of March when Your Honor returned from Fairbanks after his first recent trip there and at that time the City, defendant, announced that they were not prepared to participate in the conference because counsel had just returned from traveling outside. The parties thereupon stipulated that they would endeavor Monday, which was the earliest date that the City would be prepared, to meet and enter into a stipulation to accomplish these purposes. A meeting was held on Monday, this last Monday of this week, and a stipula-

tion was prepared, but yesterday the City was unable to sign the stipulation for reasons [16] of its own, however, there are many factors that can be stipulated to. I think 95 per cent of the matters contained in the integrated stipulation which was signed by counsel for plaintiffs and which is a matter of the files—it was filed yesterday, I believe—and using that as a basis I think we can accomplish great things with this pre-trial conference.

The Court: Well, what do you propose as a means of accomplishing—elimination of issues here or narrowing of issues or do you mean what is already set forth in the proposed stipulation?

Mr. Hellenthal: Your Honor, I would suggest that the Complaint, Supplemental Complaint and Answer be used as a guide and that we follow the normal method. For instance, take paragraph 1 of the Complaint—I know that the City right now will agree to admit the facts in that paragraph and if we follow that method, which was the sensible method followed in the stipulation, I think we can eliminate a great many factual issues.

The Court: You may propose what things you think should be agreed to here and we will see what the defendant has to say about them.

Mr. Rader: If it please the Court, the defendant has endorsed on the answer a demand for a jury trial. I think my own objection might be governed somewhat as to what the Court's ruling on that is.

The Court: Well, was it in time?

Mr. Rader: Yes, it was endorsed on the answer, [17] your Honor. I think the rule is within

10 days of the last pleading. So far as that is concerned we can request a jury trial at this moment if it had never been requested before because of the amended complaint.

The Court: No, you can't get a jury trial merely by amending pleadings.

Mr. Rader: I don't need to rely on that. It is endorsed on the original answer. Actually it is contained in paragraph 3 of defendant's prayer.

The Court: Well, apparently that has been overlooked. I don't suppose we have any jurors in attendance.

Mr. Rader: Well, it certainly wasn't overlooked by the parties. It has been discussed between myself and the plaintiffs.

The Court: It apparently has been overlooked by the Court. I don't know whether there is any jury——

The Bailiff: The jury is excused until next Monday morning.

Mr. Hellenthal: Your Honor, we have consistently taken the position that in this equitable proceeding that the defendant, nor plaintiffs for that matter, are not entitled to a jury trial. This is not a jury case. The relief sought is wholly and entirely equitable relief and I think that counsel for the City is in complete agreement on that.

The Court: What is the City's position with reference [18] to that?

Mr. Rader: If it please the Court, it is an action which is primarily an action in which it is alleged discrimination, discriminatory rates and discrimina-

tory application. Several items of fact have to be decided and I would assume that we had a right to a jury trial on it.

The Court: Just because there are questions of fact, that isn't what gives you the right of a jury trial. It is the nature of the action. What have you to say about that?

Mr. Rader: The action is pursuant to Territorial Statute. I can't state whether it is an action for loss of damages—it is an application for a refund of——

The Court: It asks for injunctive relief. Unless you contend that is merely camouflage it would appear to be an equitable action.

Mr. Rader: I don't know about camouflage, but I think they probably did want injunctive relief all right. As to the future I assume that the injunctive relief would apply, but as to the past it is the question of discrimination. I think that it is a matter of reasonableness of rates and rate classifications.

The Court: I am inclined to think it is a non-jury case. Well, you may proceed with your proposals then.

Mr. Hellenthal: Your Honor, we have proposed that paragraph 1 be admitted by the defendant—paragraph 1 of the [19] complaint. This paragraph has not been supplemented by supplemental pleadings.

The Court: Well, why does anything like that have to be admitted. It is a matter of record.

Mr. Rader: It is admitted in the answer.

Mr. Hellenthal: It is denied in the answer.

The Court: A denial of something that is a matter of public record is no denial, so you might—

Mr. Rader: There is no question on that. We will admit it.

The Court: That is always disregarded.

Mr. Hellenthal: We propose, Your Honor, that paragraph 2 be admitted for the purposes of the record in this pre-trial conference.

The Court: If it is admitted it is something of which the Court can take judicial notice of.

Mr. Hellenthal: Yes, Your Honor. Paragraph 4 is admitted. Paragraph 7(a), we propose that it be admitted except for possible arithmetical errors in computation.

The Court: Well, I suppose you mean paragraph 7 as supplemented?

Mr. Hellenthal: Yes, Your Honor.

Mr. Rader: If it please the Court, paragraph 7(a), of course, which says “correct billing per plaintiffs theory,” I am unable to read their mind, however, the City has provided—I [20] have gone on our auditor’s report—a complete breakdown of amounts paid to the City, the kilowatt hours used by the plaintiffs and the computation of what their bill would be if the meter readings were combined. Now, I think that there is a \$200.00 or \$300.00 difference. One of the differences arises out of the fact that the plaintiffs contend that \$400.00 damage and \$400.00 a month since January 1 should be included and I think they have included it in their supplemental pleadings. I can’t agree with that, but this is largely a matter of mathematical computation and

I think Mr. Hellenthal has received copies of this, have you not, Mr. Hellenthal?

Mr. Hellenthal: No, not their final computation, but we did work closely with the City people in the preliminary computation.

Mr. Rader: Let me ask Mr. Hellenthal if he would accept our computations?

Mr. Hellenthal: I would be very happy to go over them, yes. I think that, of course, is within our savings clause except for errors in arithmetical computation. I am more interested in the admission as to the body of paragraph 7(a).

Mr. Rader: What do you mean "the body of paragraph 7(a)"?

Mr. Hellenthal: The words beginning on page 2 of the complaint "That plaintiffs are each furnished" as supplemented by paragraph 1 of the supplemental complaint of Richardson Vista [21] Corporation and as supplemented by paragraph 1(b) of supplemental complaint of Panoramic View Corporation.

Mr. Rader: If it please the Court, I am not going to admit to their supplemental complaints because they are supplemental complaints. I think they are trying to change their whole theory of the case. Now, I will admit these computations and I will admit the first preface matter of paragraph 7 of the plaintiff's original complaint.

Mr. Hellenthal: Would you specify that, please.

Mr. Rader: Well, all of that that goes before 7(a).

Mr. Hellenthal: Fine.

Mr. Rader: I will admit that and if they would merely examine our rate computations here as to the correctness of them, and Mr. Hellenthal has been working on this thing with the City auditors more than I have, or we will call an auditor to introduce and prove that our figures are correct if they don't want to accept them.

Mr. Hellenthal: Will Mr. Rader admit the first line of paragraph 1 of Richardson Vista supplemental complaint—the first sentence, rather?

The Court: Well, aren't there 2 supplemental complaints?

Mr. Hellenthal: Yes, Your Honor.

The Court: Which one are you referring to now?

Mr. Hellenthal: Richardson Vista supplemental complaint which was filed March 1, 1955. [22]

Mr. Rader: You mean all of Number 1, that one sentence?

Mr. Hellenthal: The first sentence of Number 1, Mr. Rader.

Mr. Rader: "That during the calendar years 1952, 1953 and 1954, plaintiff Richardson Vista Corporation was billed monthly as if each of plaintiffs' nineteen buildings were a separate customer of defendant." We will admit that.

Mr. Hellenthal: Will Mr. Rader admit the second sentence of paragraph 1 of Richardson Vista supplemental complaint?

Mr. Rader: Admit you were overcharged? Of course not.

Mr. Hellenthal: Is there any portion of that sentence that can be admitted?

Mr. Rader: I will admit that we have charged you in accordance with—and I believe we might so mark this so we know what we are talking about. Will you mark this as Defendant's Exhibit A. We will admit that the defendant, from August 1, 1951, to December, 1954, billed and the plaintiffs paid in accordance with Defendant's Exhibit A for identification. We will also admit that we threatened to continue billing each of plaintiffs as an individual consumer, which I think is what you want, isn't it?

Mr. Hellenthal: Partly. May I examine Defendant's Exhibit A marked for identification—no, it is marked A without qualification.

Mr. Rader: It should be for identification.

Mr. Hellenthal: It isn't complete because it relates only to Panoramic View. I think the subject at this time is [23] Richardson Vista schedule and then later get to Panoramic View.

The Court: You mean you have the wrong paper?

Mr. Reischling: 7(b) is for Panoramic View. It is quite similar to 7(a). We will discuss that, if the court will permit, in a moment.

Mr. Hellenthal: So I would suggest that the paper which is marked Exhibit A be withdrawn and that a new A be substituted and marked merely for identification.

Mr. Rader: If it please the court, we have Panoramic View marked A and Richardson Vista will be marked B.

Mr. Hellenthal: Now, of course, I am not pre-

pared to stipulate as to the accuracy of these things, never having seen them before, but I do agree they should be marked then we will go over them and we will be getting some place. Now, if I understand it correctly a paper consisting of 2 parts representing "Electrical Billing to Anchorage Rental Service for Richardson Vista Apartments—House Meters" and for "Panoramic View Apartments—House Meters" has been marked Exhibits A and B, is that correct?

The Clerk: Yes.

Mr. Hellenthal: Where is the other part?

Mr. Rader: Here it is.

Mr. Hellenthal: The compilation as to Panoramic View is marked Defendant's Exhibit A for identification. The compilation for Richardson Vista—these are both Panoramic View.

Mr. Reischling: May I say for the record [24] that buildings 20 to 33 are Panoramic View as shown on that exhibit so there should be no difficulty.

Mr. Hellenthal: Your Honor, we have no reason in the world to doubt the accuracy of the compilation because to the preliminary compilation we gave our compilation to the City, they in turn gave their preliminaries to us and I think we are off a few dollars. This is a final one I have never seen before and I am almost positive it is correct, but not having seen it I will not admit it at this moment, but we will within a few hours.

Mr. Rader: If it please the court, now in both of these exhibits I want to make it clear that we are not agreeing that either corporation is entitled to

the rates which they contend, but we have for the convenience of the court and for the convenience of the litigants attempted to include them all in one exhibit so as to show the difference.

The Court: Well, as I understand it, all that these tables show is the charges that have already been made against the two corporations.

Mr. Rader: And it also shows the difference in what those charges would have been had all of the house meters been combined and read as one meter on the consumption indicated month by month. In other words, I think it indicates a difference in the theories of billing.

The Court: Well, the difference, as I understand it, is based on the contention of the plaintiffs and the contention of [25] the city.

Mr. Rader: That is correct.

Mr. Hellenthal: Are you prepared, Mr. Rader, to stipulate which schedule was applied at all times and in all points in the compilation at this moment?

Mr. Rader: Yes, it would be our published rate schedules as they were brought down to date.

Mr. Hellenthal: Do you have at your fingertips the dates when the changes were made and what changes were made? In other words, I think we can admit that Schedule C-1 was followed throughout 1951 and probably 1952; then somewhere in 1953 there was a change made; later another in 1954; another in 1955—2 in 1955. Are you prepared to stipulate as to what changes were made and where?

The Court: Well, before you discuss that is

there any possibility of agreeing on these figures as reflected in these exhibits?

Mr. Hellenthal: I am sure—we have asked that the applicable schedules be produced in court and I think they are produced and when we have those papers we will be able to. Can we pass that then, Mr. Rader, for the moment?

Mr. Rader: I think we can handle it right now.

Mr. Reischling: If the court please, before we get into the matter of application of rates to schedules, the court will note that the supplemental complaint of Panoramic View is drawn [26] slightly different than that of Richardson Vista.

The Court: Is it reflected in this exhibit?

Mr. Reischling: Yes.

The Court: It seems to me that in order to expedite this thing you ought to know right now whether you are going to insist on proof that the computations that have been made are correct or whether you can agree that these figures are correct? In other words, if it is going to take a week here to go over the bookkeeping of the City I might as well refer the case to a Master for accounting.

Mr. Hellenthal: No, your Honor, I stated, and I believe correctly, that at 1:00 or 2:00 o'clock this afternoon we will be prepared to say whether these schedules which we have just seen for the first time reflect the true factual picture, but on the question of application of tariffs that can only be determined when the documents that we have demanded are produced.

Mr. Reischling: I wanted to make my point,

if the court please, that we have alleged that Panoramic View used a certain number of kilowatt hours during the period set forth in the complaint, that is, annually, and by the months the City has furnished us as is shown in Exhibit A a total compilation of kilowatt hours together with their computation of a rate schedule. Now, we have alleged in our supplemental complaint that we are entitled to a rate in accordance with the quantity of power consumed by us. In other words, we are not arbitrarily saying we are [27] entitled to Schedule C-1 or Schedule C-2. We contend that is a matter for the court to determine. That is a matter of law on the basis of power that was consumed as to what classification into which we fall, and accordingly it would be determined just automatically as to which rate we are entitled to. That is the manner in which we have amended 7(a) and I think it is a very simple matter. As soon as it has been determined the City can see, as I know they will, the total quantity of power that was used by us, but we are not contending in that paragraph that we are entitled to any special rate, but the rate to which we should be entitled in accordance with the service that is furnished to us and the quantity of power that is used by us. Have I made myself clear on that?

The Court: Yes. I am just wondering now if we are not putting the cart before the horse if the court must first determine what schedule should have been applied, then there is no use of talking about figures here. The compilation of that would

have to be determined first then it would be a matter of computation.

Mr. Reischling: That is our contention.

Mr. Hellenthal: Mr. Rader I believe is prepared to stipulate as to what schedules were applied during various periods. Am I not correct?

Mr. Rader: Yes.

The Court: Well, wouldn't that be a part of the computation? It seems to me what you should try to agree on now is [28] what schedules were applicable.

Mr. Hellenthal: But Mr. Rader will tell us what application of schedules the City has made during all periods.

The Court: But that is a part of the computation, it seems to me.

Mr. Hellenthal: Otherwise we will have to take proof on it.

Mr. Rader: If it please the court, I am completely unable to understand Mr. Hellenthal. He is willing to agree our computations are right which are mitigated on the schedule. What do you mean, you will have to take proof on it?

Mr. Hellenthal: If I go all through this schedule—I know that at different periods here, on different dates during this 4-year period that different rate schedules were applied. Now, where the break-off points are would take me an enormous amount of time to determine and that matter is right at your fingertips.

The Court: Well, why bother at this stage with what schedules were applied. It seems to me all we

would have to have here is the current consumed. If you can agree on that then the court finds what schedules were applicable. That is all we need.

Mr. Rader: That is correct.

The Court: Well, how about agreeing then?

Mr. Rader: That is correct. We have prepared the exhibits. We tried to prepare what they did pay and we tried to follow through their theory consistently as to what they should pay [29] and make the difference which would put it all at the court's fingertips. Right there is what we tried to do with these exhibits A and B.

Mr. Hellenthal: On quantity I anticipate no trouble whatsoever.

The Court: Well, the court doesn't find it satisfactory to say that you don't anticipate it. This is the time to agree on something, if possible, and if you just anticipate agreements, well, you might as well go ahead with the trial.

Mr. Hellenthal: I have got to check every page of this against my figures. I plan to do that during the noon hour.

The Court: You don't trust the City's figures?

Mr. Hellenthal: Oh, yes, but errors and things like that can creep in, but, as I say, I have no reason to distrust them, none whatsoever, but I don't want to buy a pig in the poke.

The Court: Well, it seems to me that we are getting down now to not where we are trying the case, but where we are preparing it for trial.

Mr. Reischling: If the court please, I, of course,

feel that the City has given us a true and correct statement of the power, that was furnished to us which was used by us. I do not want, however, to be bound, and I am certain counsel does not either, by the conclusions that we reach and I think what we are talking about now is the conclusions which the City has reached as shown by these exhibits. Now, they have even tabulated this to show [30] the total amount of money that was paid by Richardson Vista on the one hand and Panoramic View on the other.

The Court: You say they have or haven't?

Mr. Reischling: They have. I mean, it is tabulated on the exhibits. We can concede we paid that much money. They do, however, further have a figure which they deduct from the amount that we paid and we do not know how they arrived at that figure, that is, whether it was combined billing on C-1 rate or C-2 rate or what particular rate they used and that is one of the things we believe that the court will eventually determine, what is the proper rate, so we are merely asking the City to stipulate as to the amount of power that was used and we paid the bills that we say we paid by the money they received and that they were paid in effect on protest, which the record will show they were, and I think the City will concede that inasmuch as this case has been pending since January, 1952.

The Court: Well, it seems to me that if we have the current consumed and amount paid, or if you can agree——

Mr. Hellenthal: We can agree on that.

The Court: But when? Right now?

Mr. Hellenthal: We will agree right now subject

to any errors in arithmetic that the quantities are correct and that the amounts that we paid are correct.

Mr. Reischling: Excepting as to the proper application of the rate which the City has applied on this second figure. We [31] do not know whether or not they used the proper rate in arriving at the figure which they deducted from the amount we paid them.

The Court: I have already announced that is something that will have to be determined by the court, but at the present time it seems to me we need nothing more than an agreement on the amount of current consumed and amount paid.

Mr. Reischling: That is right.

The Court: Well, can we agree on that now?

Mr. Hellenthal: Yes, I believe we have agreed.

Mr. Rader: Yes.

The Court: All right. Now, where do these figures appear? You must remember I haven't seen these exhibits—the total current consumed shown in these exhibits.

Mr. Reischling: In 7(b), Your Honor, the total month by month power used is set forth there by kilowatt hours.

Mr. Hellenthal: Perhaps Mr. Rader can tell us quicker than I can on those totals.

Mr. Rader: Referring to Exhibit A as an example, the building number is the first lefthand column and the months are across the top. The KW Hours, the column under those indicate the kilowatt hours consumed and the figure "billed" or the col-

umn under "billed" indicate the amount that the City of Anchorage billed for those kilowatt hours on the buildings indicated. Now, it has "Totals as Billed" down at the bottom of the lefthand column. That includes the total amount consumed by all of Panoramic [32] View for, as an example, the first column, September, 1951. Then under "Billed" is the total of what they paid the City.

The Court: Then that is sort of misleading, but so long as it is understood that the billing or the amounts paid in each instance coincide with that for which they were billed, why, we can consider the heading as comprehended payment also. In other words, the amount billed was the amount paid.

Mr. Rader: Yes, we agree to that. There is no question about that. Now, the next line is "Total by Combining Readings." Now, that is what they would have had to pay if all of their meters had been combined within Schedule C of the commercial rates of the existing rates at that time, which we understand is their theory of the case. To understand this, Your Honor would have to understand the more you——

The Court: Of course, I understand that, but I think this last item would merely be of some assistance to the Court at perhaps a later stage, but it seems to me all we need here is an agreement on the total current consumed and amount paid.

Mr. Hellenthal: We can agree on that.

The Court: Well, then it seems to me we can go to the next item.

Mr. Hellenthal: The next is paragraph—well, the dates that the different tariffs went into effect and Mr. Rader has indicated he is prepared to give us those dates.

Mr. Rader: Defendant's Exhibit C is the tariff published [33] in the telephone directory.

Mr. Reischling: May I have the date of that counsel, to Exhibit C? You didn't give us the date.

Mr. Hellenthal: May I examine it. Now, I notice you have written on here "published summer 1951."

Mr. Rader: Yes.

Mr. Hellenthal: This Exhibit C for Identification is identical with Exhibit A of Plaintiffs' Complaint, is it not?

Mr. Rader: I believe it is. It is the rates that went into effect January 1, 1951.

Mr. Hellenthal: Can we have, instead of the summer 1951 give the effective date rather than the published date, if you have it?

Mr. Rader: Do you want me to write that on the exhibit?

Mr. Reischling: That will be all right.

Mr. Hellenthal: We have checked it. It is identical to Exhibit A of Plaintiffs' Complaint.

Mr. Rader: I have written on it "January 1, 1951."

Mr. Hellenthal: Fine.

Mr. Reischling: Satisfactory.

The Court: Then you are agreed on that.

Mr. Rader: Yes.

The Court: Does that set forth all of the schedules that are involved here?

Mr. Rader: I didn't understand. [34]

The Court: Does that set forth all of the schedules?

Mr. Rader: No, there have been several revisions since that date and I will produce those right now if your Honor——

Mr. Hellenthal: Now, one more stipulation. Is counsel prepared to stipulate that Exhibit C for Identification was the entire and complete rate tariff in force in the City of Anchorage at that time, that is, from January 1, 1951, until the effective date of the next exhibit you are going to offer?

Mr. Rader: I can only stipulate that it is the rate schedule published in the telephone directory and remained in effect until the next exhibit which I will produce.

Mr. Hellenthal: Do you have any other rate schedules other than those published in the telephone directory during that period?

Mr. Rader: We have no other rate schedules. We have some regulations which will be applicable.

Mr. Hellenthal: And you have produced them?

Mr. Rader: I will produce them.

Mr. Hellenthal: Have you produced them in Court in accordance with our notice to produce them?

Mr. Rader: I think I have them in my possession at this moment.

Mr. Hellenthal: Could I see them?

Mr. Rader: I would prefer we not see them now.

Mr. Reischling: I have one question that has not yet [35] been decided. Is this Exhibit C which was

just stipulated to the exhibit upon which the rates charged Panoramic View and Richardson Vista in 1951 was based? Is this the one?

Mr. Rader: Yes.

Mr. Reischling: It is the one and this is the schedule then upon which the rates charged to these two plaintiffs were charged until the next published revision of that schedule. Is that correct?

Mr. Rader: That is correct.

Mr. Hellenthal: Which will be Exhibit D.

Mr. Rader: Yes.

Mr. Reischling: Then to go just one step further on this stipulation, each subsequent published revision would be the revised schedule upon which the rates charged these two plaintiffs would have been figured during each succeeding period of time?

Mr. Rader: That is correct.

Mr. Reischling: And the rates would have been figured on nothing else other than these particular schedules, is that correct?

Mr. Rader: Counsel keep wanting to limit the rules and regulations of the City of Anchorage Utility Department to these published rates. I will not do that. I will say that these the rates, the schedule of tariffs upon which the rates were computed. I do not admit that it includes all of the regulations of the P.U.D. department as to condition of service. [36]

Mr. Hellenthal: Now, may I ask—well, I don't want to belabor this, but during the period covered by Exhibit C was Schedule C, commercial rate, the rate that was applied by the defendant?

Mr. Rader: Yes.

Mr. Hellenthal: No other of the scheduled tariff in Exhibit C?

Mr. Rader: That is correct, only Schedule C.

Mr. Hellenthal: I am prepared then to pass on to Exhibit D.

Mr. Rader: Do you stipulate you admit it should be Schedule C?

Mr. Hellenthal: From all we know we will admit that. We frankly don't know what the most favorable rate is, but we suspect it is Schedule C.

The Court: If Schedule C embodies the entire schedule then in effect, then, of course, it seems to me that it would have to include the rate charged here.

Mr. Hellenthal: Well, to be perfectly frank about it, for this particular period of time it is Schedule C, but it isn't going to be for the periods of time in some of these succeeding exhibits necessarily. But we do say this, that if Schedule C during 1951 was the most favorable rate applicable to plaintiffs' customers we will go along on that condition, but we do not know what the most favorable is. [37]

The Court: You will go along where?

Mr. Hellenthal: We will stipulate that was the one applied and should have been applied.

The Court: Well, you mean if it was the most favorable rate you are willing to agree. Is that it?

Mr. Hellenthal: Oh, no. If it were the most favorable rate we would definitely agree it should apply.

The Court: That is what I say. You would agree it was the most favorable rate.

Mr. Hellenthal: Yes, Your Honor.

The Court: You are willing to agree that is the rate that should have been charged because it is the most favorable rate?

Mr. Hellenthal: If it is the most favorable rate and we strongly suspect that is the most favorable rate.

The Court: I don't know that that is going to contribute much because, after all, if the Court determines that some other schedule is applicable, rather than the one that has the most favorable rate, you don't contribute anything by merely stating you are willing to take the most favorable rate.

Mr. Reischling: I didn't understand Your Honor's ruling, but I believe that the Court should understand when we talk about most favorable rate we are talking about it in connection with a specific classification that is made, that is all; that each particular classification the Utilities Department may make [38] as to the service it renders consumers. All consumers within that classification are entitled to the most favorable rate. In other words, it must be uniform. I believe that is the law. That is all we are contending here.

The Court: That is the reason why I think it is unnecessary to express yourself with reference to that. If that happens to be the law the Court is going to make that determination, so we needn't go into it now.

Mr. Reischling: That is what I understood, Your Honor.

Mr. Rader: If it please the Court, some of my difficulty is because of the fact that plaintiffs, in their complaint and in conversations until yesterday—it is my understanding that they were limiting themselves to Schedule C and had a concrete contention as to what they were entitled to. By the amended complaint they are saying, “We don’t know what we are entitled to.” Which in effect says, “Come in and give us something. We don’t know.” Some of my schedules did not take into consideration every possible rate schedule unless it was the effective rate C under which we consistently billed them. Now, there is a schedule known as “LP” which is large power. I don’t know the exact effective date of that. I think it was the summer of 1953, but I don’t have with me the actual effective date of that. I assume what they say is, when we say whatever rate is most applicable, why, then I have to produce every rate that we have. Actually, this is as available to them as it is to me. I don’t know why they [39] don’t produce them themselves. They are in the telephone books and they can tell us what they want to do on it, but, at any rate, I have a published schedule of April, 1953. I don’t think the effective date is important because it doesn’t change Schedule C from Exhibit C, but we can put it in. It may have some other schedule that they are interested in—if you would make that Defendant’s Exhibit D for Identification.

Mr. Hellenthal: What is the effective date of that?

Mr. Rader: I don't know, but it doesn't change Schedule C so I didn't consider it of any importance.

The Court: I thought you said it was effective April, 1953.

Mr. Rader: No, it was published April, 1953. Possibly it was published several months before it was effective.

The Court: But at any rate it is the next schedule?

Mr. Rader: It is the next schedule, yes.

Mr. Hellenthal: By published, you mean published in the phone book or on the City Hall bulletin board?

Mr. Rader: In the phone book.

Mr. Hellenthal: You mean that is the first phone book that came out that had it in it?

Mr. Rader: That is correct.

Mr. Reischling: For the record, assuming that we were entitled to that particular rate, I think we are entitled to have the date under Exhibit D and I think it is within the knowledge of [40] the City.

The Court: Except the City has explained why he doesn't have it and it seems to be a good explanation.

Mr. Hellenthal: I see absolutely no change between Exhibits C and D. They are identical.

Mr. Rader: I think there is one change, isn't there?

Mr. Hellenthal: Where is it?

Mr. Rader: I know that Schedule C is identical. That is the only one I thought we were going to be tied in with. Well, for instance, the published rate of April, 1953, doesn't have rural rate schedule and there are several other changes in the thing.

Mr. Hellenthal: I don't see any other changes other than the admission of the rural rate which clearly is not applicable here.

The Court: That would simplify things. If that is the next case we could go on to the next schedule.

Mr. Rader: There are more changes than that. If you admit you don't need it for your theory we will forget about it.

Mr. Hellenthal: That is right. We will leave it the way it is. Let's go on to the next schedule.

Mr. Rader: There are several changes in it.

The Court: Let's see, that is marked "D," is it?

The Deputy Clerk: Defendant's Exhibit D for Identification.

The Court: Well, I don't think these exhibits, when you [41] agree on them, ought to be marked for identification. They ought to be marked as exhibits in the case.

Mr. Rader: I was going to suggest that and overlooked it. Is that satisfactory with counsel?

Mr. Hellenthal: Yes, it is on these exhibits.

Mr. Rader: Defendant's Exhibit E is the rate that went into effect July 1 of 1954.

Mr. Hellenthal: Anything further, Mr. Rader?

Mr. Rader: With permission of counsel, so that the Court may keep them clear—the exhibits speak

for themselves—I'd like to write on that exhibit the effective date. I don't believe it has it.

Mr. Hellenthal: Yes, will you write the effective date on it?

Mr. Rader: I am writing at the bottom.

Mr. Hellenthal: You have written "Effective date July 1, 1954." Anything further, Mr. Rader?

Mr. Rader: We have one more rate schedule.

Mr. Hellenthal: May I ask in connection then with D—I read Schedule (LP), large power users from Exhibit D. From Exhibit E, "This schedule is applicable to each meter furnishing electricity under Schedules (D), (C), or (P) and excluding Schedules (B), (WD), and (WC), when the monthly consumption is 10,000 KWH or more per month per meter. First 10,000 KWHrs. @ .0435. 10,001 to 40,000 KWH @ .035 per KW. Over 40,000 KWH @ .0285 per KW. [42] the 5% reduction does not apply to Schedule (LP). Any special rate other than those listed in Schedules (D), (C) or (P) and not otherwise excluded, are not subject to the 5% reduction." Mr. Rader, are you prepared to stipulate that that schedule which I have just concluded reading was placed into effect February 1, 1953, rather than on July 1, 1954?

Mr. Rader: I am not prepared at this moment to stipulate that it was. As I say, that is a different schedule than I had anticipated we would be using in Court. I will check it and find out if it is specially handled. I don't know.

Mr. Hellenthal: Then are you prepared to qualify the effective date by perhaps inserting the words, "Except as to Schedule (LP)"?

Mr. Rader: Well if you have information to the contrary we will limit the stipulation. I don't know.

Mr. Reischling: I think if counsel could find out the effective date and advise us after the recess that would be satisfactory.

Mr. Hellenthal: Now, Mr. Rader, again considering Exhibit E, I shall read the last printed paragraph of Schedule C, "Schedule (C) Commercial Rate subject to 5% reduction on all consumption over the minimum monthly charge." Was that done the effective date of that change?

Mr. Rader: That was effective on all billings after July 1, 1954. [43]

Mr. Hellenthal: But not the LP to your knowledge?

Mr. Rader: I don't know about the LP. I will have to examine that rate.

Mr. Hellenthal: Mr. Rader, are you prepared to stipulate that the two principal and in fact only changes in Exhibit E were the inclusion of Schedule LP and the 5 per cent reduction to commercial C rate?

Mr. Rader: I am sorry, I didn't understand you.

Mr. Hellenthal: Of course, the records speak for themselves, I suppose, but I will withdraw that, and we are prepared to go on to Exhibit F.

Mr. Rader: If it please the Court, if we could leave Exhibit F open—it is the currently published schedule effective January 2 in the latest edition of the telephone book. I am sure that plaintiffs have several of those schedules in their possession at this moment, don't you?

Mr. Hellenthal: We have something we cut out of the phone book entitled "Light and Power Tariff, effective rate on all billing starting January 2, 1955, and thereafter." Then we have another piece out of the phone book that gives "Effective tariff starting February 10, 1955, and thereafter." Then we have another one saying "Effective tariff starting March 1, 1955, and thereafter." We have three.

The Court: Well, do we need to concern ourselves with the one that is not in effect? [44]

Mr. Hellenthal: Well, I have here the first one which we think would be "F."

Mr. Rader: Might as well make that Exhibit F.

Mr. Hellenthal: Will you stipulate that is the full and complete tariff effective January 2, 1955?

Mr. Rader: I will stipulate that is the rates on which the billings were computed in effect at that time and that is all.

Mr. Hellenthal: Yes. Now, I will hand counsel—then you don't have the February change?

Mr. Rader: No.

Mr. Hellenthal: This is the March, 1955, phone book which was published last week, at least we got our copy last week, and it has something in here entitled "Effective rate on all billing dated February 10, 1955, and thereafter." I will hand that to counsel and see what he can come up with on that one. Now, the last thing that I think has a bearing would be another page in this book entitled "City of Anchorage Urban Light and Power Rates, effective all billing dated May 1, 1955, and thereafter."

Mr. Rader: All right.

Mr. Hellenthal: It has some relevancy so I would be willing that——

The Court: How would that have any relevancy?

Mr. Hellenthal: I don't exactly know myself except we are interested in the future and we ask that future incorrect applications of existing favorable rates be enjoined. [45]

Mr. Rader: Well, it, of course, depends on the outcome of this case so this one schedule may have to be revised. I don't know what will happen there.

The Court: I don't think we have to concern ourselves with any proposed future schedule.

Mr. Hellenthal: Well, I don't have a knife or anything here, but why don't we just give them the book and stipulate.

Mr. Cottis: I have a knife.

Mr. Hellenthal: Let's go on then. Now, are those the complete rate schedules we have stipulated to?

Mr. Rader: Mark that Exhibit G.

Mr. Hellenthal: Exhibits A to G, inclusive.

The Court: What does G show as to the effective date, if anything?

Mr. Rader: February 10, 1955.

Mr. Hellenthal: The last two, it is my understanding both have the effective dates incorporated in the provisions of the schedules themselves. So now I think the next step will be paragraph 11 of the complaint.

The Court: Well, I think that is superseded by Exhibits A and B.

Mr. Hellenthal: Now, let me collect my wits here. Yes, it is tied in with 7 as supplemented and

I, too, believe that the stipulation that was made as to paragraph 7 would equally apply to paragraph 11. 11 refers by reference to 7 which includes A and B [46] so any stipulation entered into applicable to A and B would be equally applicable to paragraph 11.

The Court: Well, I don't think there is any dispute on that.

Mr. Hellenthal: Then I should like to proceed to paragraph 3 of the complaint. It is our understanding that the City will stipulate to the truth of that paragraph if the following is added commencing with the words "that the streets"—except the last clause in the paragraph commencing with the words "that the streets." In other words, our preliminary discussions have indicated that if the words "that the streets and ways within both of said projects are the property of plaintiffs and have not been dedicated to the use of the public generally," our previous understanding has been if those words are omitted and the following words substituted the paragraph can be admitted, and substituting for those words I read the following, "That since"—

The Court: It is set forth in this proposed stipulation so you needn't read it.

Mr. Hellenthal: Ask that the words as set forth in the proposed stipulation be substituted and may I ask counsel for the City if that would be agreeable and if not what suggestions he would have to offer.

Mr. Rader: In response to Mr. Hellenthal's inquiry, it is the same thing I told him yesterday;

that both tracts are [47] unsubdivided and located within the City of Anchorage. We admit that, except for the fact that we consider the streets as subdividing the tract; the streets that exist, or if he wants to say "undivided except for the streets" we will admit that. Further, that the language in the proposed stipulation is acceptable providing that the dedication of the streets to the City of Anchorage for a period of 75 years is more or less a permit.

The Court: Well, as I understand it, all you want to stipulate to is the factual situation.

Mr. Rader: Yes.

The Court: Well, why in the world should there be any difficulty in agreeing on that, that is an existing thing visible to everybody.

Mr. Rader: I thought we were agreed on it. With the changes that we are now making I don't think there is any issue on it. The rest of the language in the proposed stipulation is proper except for the last sentence of that proposed language or the last clause which reads, "though dedication in fact has been accomplished." I don't stipulate to that. I don't understand that to be a fact. I don't believe there is any argument about that.

The Court: Well, then as I understand it, as set forth in the proposed stipulation you agree, do you not, but not as to the last clause?

Mr. Rader: If you insert additional words before this [48] clause "except for streets the tract is unsubdivided."

The Court: But where would you put that in the quoted material?

Mr. Rader: You would have to make it the first sentence which is omitted under the proposed stipulation.

Mr. Reischling: If the court please, I have listened to counsel's suggestion, but I have never heard before that an undivided tract becomes a subdivided tract with reference to streets as a legal matter. Now, actually, as a matter of fact, both Richardson Vista and Panoramic View were large unsubdivided tracts and they still are and Panoramic View just did dedicate certain streets to the City, but it is still an unsubdivided tract included within which are dedicated streets for the period of the leasehold.

Mr. Hellenthal: In the case only of one project.

The Court: Why do we have to speak in legal terms or in terms of legal conclusions? Why not say what the facts are? It is improper to stipulate to questions of law anyhow.

Mr. Hellenthal: What do you have here? A map of the project?

Mr. Rader: Yes.

Mr. Hellenthal: Do you want to stipulate that in the record?

Mr. Rader: Yes, stipulate that the streets are as they exist. [49]

Mr. Hellenthal: We will certainly go for that.

The Court: It may be marked as Exhibit H.

Mr. Rader: You will stipulate that buildings No. 1 through 19 is Richardson Vista; buildings 20 through 33 is Panoramic View and that the remainder of the buildings shown on there are three housing projects known as Hollywood Vista?

Mr. Reischling: Of course, that has no connection with this particular case.

Mr. Hellenthal: They are not a party to this case.

The Court: We will recess to 2:00 p.m.

(Whereupon, at 11:50 o'clock a.m., the court continues the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., all counsel being present, the trial of said cause was resumed.)

Mr. Rader: If it please the court, there is one thing that counsel asked me to stipulate to this morning and I am prepared to now, and that is the LP rate on Defendant's Exhibit E. It is called Schedule LP, Large Power Users. That the rate went into effect February 1, 1953. I think that was what you asked me to stipulate to this morning.

Mr. Hellenthal: I made that request and that you have complied with. [50]

The Court: What does that bring us down to?

Mr. Hellenthal: That brings us down, your Honor, to where we left off this morning, which was in discussing paragraph 3 of the complaint and Mr. Rader was discussing the matters in the stipulation on page 2 of the stipulation about dedication and the like.

The Court: But we passed over that.

Mr. Hellenthal: Then he passed over that and went to this map which——

The Court: That is also water over the dam. Now, we must be down to paragraph 3 of the proposed stipulation.

Mr. Hellenthal: Yes. Now, again we go back to paragraph 3. Now, does counsel for defendant admit all matters? It isn't perfectly clear in my mind that all matters in paragraph 3 of the complaint down to the last clause beginning with the words "that the streets" is admitted.

The Court: Well, I think what occurred was that I expressed the opinion that we need not concern ourselves with any stipulation expressed in legal terms.

Mr. Hellenthal: Those are all facts.

The Court: That is all the court is interested in, the actual situation there and that was portrayed by Exhibit H.

Mr. Hellenthal: No, your Honor, there is more to paragraph 3. There are more facts contained in paragraph 3 than Exhibit H portrays. [51]

The Court: Well, what are they?

Mr. Hellenthal: Some of them are that the units in Panoramic View consist of 8 buildings with 22 units, 4 with 16 and 2 with 12. That does not appear on Exhibit G or Exhibit H. Let me make sure. On Exhibit H, rather than G—and if I may correct the transcript. So I ask counsel if he will stipulate that the facts—and I submit that there is nothing but facts in paragraph 3 down to the last clause—will you stipulate that those facts are true and admit them?

The Court: Well, you have already agreed in connection with Exhibit H that there are 19 buildings of the Richardson Vista Corporation and—

Mr. Hellenthal: 14 of Panoramic View Corporation.

The Court: Now, in addition to the number of buildings you would also like to have the defendant agree as to the number of units?

Mr. Hellenthal: Yes, your Honor.

Mr. Rader: We so agree.

Mr. Hellenthal: Then we are in agreement down to the last clause.

Mr. Rader: Well, excepting insofar as you say both tracts are unsubdivided and both in the City of Anchorage. We admit they are in the City of Anchorage. We admit the subdivision is as represented on the map, if there is a subdivision. We will further agree with you as to the lease condition, the fact you are [52] leasing from the Government 50 year or 25 renewal option.

Mr. Hellenthal: Why don't we take them one at a time.

Mr. Rader: If you hear anything that I am saying that is wrong, if there is anything you don't agree with—I understand those to be the facts.

Mr. Hellenthal: I will go to the subdivision. You say if it is subdivided you will agree it is. I will go on that.

Mr. Rader: That is, as represented on the map. I believe it is Exhibit H.

Mr. Hellenthal: Yes.

Mr. Rader: And that the streets located around Panoramic View have been dedicated at least for a period of 75 years, being the period of the plaintiffs' interest in that. That the streets around Richardson

Vista have not been dedicated because of the fact it is on a military reservation.

Mr. Hellenthal: I don't know the reason.

Mr. Rader: Leave off the reason, but they have not been dedicated, and you will stipulate to the further fact they are located on a military reservation, will you not?

Mr. Hellenthal: Now, first I believe your proposed stipulation is correct except that the Panoramic View dedication was made within the last 4 months. Is that not correct?

Mr. Reischling: The Panoramic View dedication was made within very recent months. I don't see the materiality as to the time. I cannot state the time exactly, but that is a matter of [53] record.

Mr. Hellenthal: Now, the terms of the leases. I think we might as well get that perfectly clear. The lease on Richardson Vista is for 50 years.

Mr. Reischling: The lease on Richardson Vista is for 75 years. The lease on Panoramic View unsubdivided tract is for 50 years or with the option for the lessee to renew in 25 years.

Mr. Hellenthal: And the other is an express 75 years.

Mr. Reischling: That is correct.

Mr. Rader: We also agree the City exercises police jurisdiction over the streets, that we maintain them with City equipment, snow removal with City equipment and handling traffic on them. I don't know of anything else.

Mr. Hellenthal: I can't see any materiality to that.

Mr. Reischling: Isn't it similar to the words of the complaint where it was set forth the City exercised complete and full jurisdiction over the streets? Isn't that very simple?

Mr. Hellenthal: Now, will counsel for the defendant agree to the language of the stipulation as qualified by the statement we have just made?

Mr. Rader: I agree to the stipulation we just made. I think it is all inclusive. If you know anything additional to that or anything that should be changed, let's discuss it.

Mr. Hellenthal: Then let's add that the defendant's agreement with plaintiff has asserted full jurisdiction over the [54] streets located on both projects. Is that agreeable with counsel for the defendant?

Mr. Rader: On the one that has been dedicated that has been done by agreement. On the other it is by tacit understanding. We have, as a matter of fact, exercised jurisdiction, but whether or not we will next week is another thing.

The Court: Is the exact status of these streets so material to this controversy?

Mr. Hellenthal: Not too material, no.

The Court: What are we quibbling over?

Mr. Rader: They have pleaded them. They may be material to this case. I assume they put them in the complaint for a good reason.

The Court: Well, it isn't apparent to me and it hasn't been stated.

Mr. Hellenthal: Then you will so stipulate?

Mr. Rader: Yes.

Mr. Hellenthal: Now, we go to paragraph 5. Will counsel for the defendant stipulate that the following be substituted for the present paragraph 5, "That each of plaintiffs' projects——"

The Court: He has the proposed stipulation, has he not? It is not necessary to read it. Just ask him if he will agree to that.

Mr. Hellenthal: Will you agree to proposed stipulation—paragraph 5 of the proposed [55] stipulation?

Mr. Rader: Yes.

Mr. Hellenthal: Paragraph 4 of the proposed stipulation?

Mr. Rader: I am unable to stipulate to that.

Mr. Hellenthal: May we have leave of the court then to amend the complaint to insert the word "claimed" before the word "accordance" in line 1?

The Court: It doesn't seem to make sense. How would it read?

Mr. Hellenthal: It would read as follows, your Honor, paragraph 8, "That in claimed accordance with the electrical code of defendant City of Anchorage——" rather than as it presently reads, which is, "That in accordance——"

The Court: Well, is there some objection to that amendment?

Mr. Rader: No, I have no objection to the amendment.

The Court: It may be so amended, but you don't stipulate to the facts as alleged.

Mr. Hellenthal: Then we go to paragraph 5 of the proposed stipulation. Is that agreeable to defendant, taking into consideration that in lieu of Exhibits A, B, and C, we now have Exhibits C to G, inclusive.

Mr. Rader: No, I stipulated to the exhibits as far as I know. I am not in position to stipulate that those are the full and complete rate schedule of defendant, promulgated, published and in effect, governing electric consumption of customers of the [56] defendant, together with the conditions limiting and governing the furnishing of service as set forth. I am not in position to admit that.

Mr. Hellenthal: I wonder how we are going to find that out.

The Court: Well, isn't the burden of proof on you?

Mr. Hellenthal: I think we have got it already by means of Exhibits C to H as amended by the further stipulation as to the February 1, 1953, change. As to that aspect I am sure, but as to the full and complete rate schedule I understand counsel for the City to say that he doesn't know what the full, complete and comprehensive rates for the City are at all times during this period mentioned in this lawsuit, and, frankly, when he says that I am stopped.

Mr. Reischling: If the court please, may I interject a comment here. If the court will take a look at the answer of the City which was filed to the original complaint and compare the allegations of paragraph 8 of the original complaint which the

City answered it will at once become apparent that all this amendment to this complaint is, is to set forth the only published rate schedules we have been able to find and the rate schedules which the City itself brought in here this morning in answer to our Notice to Produce and this particular paragraph, excepting as it is specifically set forth in the amended portion, was admitted by the City in its answer. Now, how the City can come along and [57] say, "We did admit before that this exhibit which you attached to your complaint was the full and complete rate schedule—which it was as of the date of the answer—and now deny that on the rate schedules that they have brought in." That in effect is what they are doing. Their answer said, "As of January or February, 1952, the exhibits which you attached was the full and complete rate schedule." All this particular amendment does is to bring this case up to date and to add to these additional promulgation of rates as have been published by the City of Anchorage and the City, of course, has the power. They are the ones who publish the rates and we get them like you do or like any other user does when they are promulgated and published and that is the only way we can get them. Now, if they deny that these are the rates—if they deny that what they have now given us are the complete rates then I submit to the court that it is up to them to produce whatever rates apparently there may be; that we have no knowledge of it.

Mr. Rader: If it please the court, this stipulation is not for the purpose of finding out rates. It is for the purpose of setting forth all these conditions and limitations to the City Service Policy and their regulations concerning the City Service policy. They understand very well why they amended this. If there was no reason for amendment we wouldn't have the present hassle here right now. That stipulation includes a lot more than rate schedules. I am willing to stipulate that so far as I am aware that the rate schedule we have previously introduced in evidence are the full and complete rate schedules, but they are [58] not regulations which completely provide for enunciate the policy and the regulations concerning conditions of service, and, this amendment, of course, is to establish that I assume. Now, I am admitting everything that Mr. Reischling says he wants admitted, but his stipulation goes considerably beyond that.

Mr. Reischling: May I submit, your Honor, in answer to counsel's statement here that a promulgation of rates, as the City of Anchorage promulgates and makes effective, forms a contract between the users of the service and the City. Now, certainly a consumer cannot be bound to a contractual obligation upon which he knows nothing at all and if counsel is taking the position that they have rules and regulations which they keep within the bosom of the City and are not available to anyone else, I submit we can't try a lawsuit on that basis; that we have the right to try this lawsuit on the basis of the contract which the City

has published and upon the rules and regulations which they have put into effect to govern the use of power by users in this community, and we have also demanded of them—and I will say this, while it is true that the formal written notice was only served upon counsel yesterday this matter has been discussed with him orally before and is no surprise and——

The Court: But what I want to know is why haven't you resorted to discovery process earlier if you want all this information?

Mr. Reischling: Your Honor, on the basis of the City's [59] answer as of February of 1952, at which time only one rate schedule had been published, we assumed on the basis of their answer that they admitted that paragraph; that that was the complete schedule. All we have done is bring our complaint up to date so that the amounts could be figured on the schedules that have since been published from time to time. And in paragraph 2 of our Notice to Produce we asked them to produce at the trial of this case all published rules and regulations pertaining to the furnishing of electrical energy by the City of Anchorage to its electrical customers, if any, other than those included in the tariffs referred to in paragraph 1 above in effect.

The Court: I understand you made this demand, but my point is that you have waited too long. You have waited until the eve of trial before you make the demand instead of resorting to the discovery process. That is why we are in the mess we are in now.

Mr. Reischling: It was only, your Honor, because they had refused to stipulate that we began to wonder that there are other rules up to that time. We had no knowledge they might have other rules.

Mr. Hellenthal: We can give you the answer to it right now. There are no others.

The Court: No other what?

Mr. Hellenthal: There are no other rules.

The Court: You are apparently seeking a concession from [60] the city that there are such rules or that there is something else.

Mr. Hellenthal: We want to stipulate there aren't, but this is the only way we can get it out of them. I know the answer, but I can't bind them. I want them to tell us and I think they should.

The Court: It just seems to me that when you filed your supplemental complaint you went on the assumption of status quo and that is where it seems to me something was unwarranted because you thereafter suspect the rate schedule has been revised or something and so you come here on the eve of trial and no wonder you have difficulty getting counsel, on such short notice, to make the concessions that would undoubtedly be made had be had adequate opportunity to look into this.

Mr. Hellenthal: Actually, your Honor, we met Monday on this matter and there was no trouble about it then and, as I say, if they had 3 weeks it wouldn't make any difference because there aren't any others.

The Court: Well, if you are so sure of that what do you want a concession for, or an admission of that for?

Mr. Hellenthal: I suppose we can resort to a subpoena. We can subpoena the same things.

The Court: Well, as I understand it, then the dispute now is over the possible existence of rules and regulations governing service. Is that it?

Mr. Rader: Apparently so, your Honor. Our understanding [61] before was that these published rates in the phone directory were our rates. This is the first time anybody discussed with me or ever inquired about what other service regulations we had connected with the utility regulations. Now, I don't know who they have talked it over with but they haven't discussed it with me. My position is that can get all kinds of, as you say, discovery matter and I don't know what their lawsuit is for. Sure, I have a good idea and was prepared for some of it and got prepared for the rest of it, but as this Notice to Produce here will show what they have asked me to produce is impossible for me to produce and matters which were never discussed before by anyone. We have the rates on the exhibits, but there are certainly a good many other conditions to our servicing of a customer on the electrical utility.

Mr. Hellenthal: What are some of them?

Mr. Rader: One of them is we don't—

The Court: I don't care for you to discuss that. If there is no concession between the parties here on this particular point, why, we will have to pass on to the next item.

Mr. Hellenthal: Our next point, your Honor—well, it is contained in paragraph 7 of the proposed stipulation—and may I ask the City's position as

to paragraph 6, rather than 7? Paragraph 6 of the proposed stipulation.

Mr. Rader: If it please the court, paragraphs 6, 7, 8, 9, 10 and 11 all seem to amend the complaint to make what they [62] say "the most favorable rate." As I understand this lawsuit I am certain if they had stated that in their original complaint I would have by some method attempted to find out what they were claiming as the most favorable rate so I could prepare exhibits as to the most favorable rate. I would have done something to find out what they were talking about when they say "most favorable rate" if in the original complaint they had put down what they paid under protest on one rate and one schedule and put down plaintiffs' theory of the case. By computation and working backwards we tried to figure out, and I think we did figure out what the theory of their case, of what they were contending is. Now they come into court the day before the trial—actually I think they said something about this Monday. I told them I wouldn't stipulate to such a thing because I don't know what they are talking about when they say "most favorable rate." I don't know what exhibits can be produced on most favorable rate. They allege no certain computation of their theory in their complaint. Now they come into this court and say, "Please, your Honor, tell us in court what our most favorable rate is." They can pick out the most favorable rate themselves. Certainly, they don't have to rely upon us or this court to tell them how to make their

mathematical computation of the most favorable rate under their theory of the case, right or wrong. That is the reason I don't admit all of those changes. I admit they are entitled to the most favorable rate. They plead they were entitled to a certain rate. Now, they [63] say, "We don't want to limit ourselves to that rate. We want the most favorable rate, whatever it may be."

The Court: Of course, it is obvious that no one can stipulate to anything of that kind. That is like saying, "Well, I will agree that you should recover the verdict that you do recover." Well, those 3 paragraphs of the proposed stipulation, 6, 7 and 8, would be similarly affected by that advice so we will have to go on to Number 9.

Mr. Hellenthal: Your Honor, I then ask that plaintiffs be permitted to amend their complaint by making the changes set out in the stipulation to paragraphs 6, 7 and 8 thereof.

The Court: Is there any objection to that?

Mr. Rader: There certainly is. I don't know what the most favorable rate is. I think it is up to them to——

The Court: Let them prove it.

Mr. Rader: Well, if I knew what they are claiming I could perhaps adduce some counterproof, but if I am going to be forced in a position here—they may be proving a rate that might take me with City employees over there a couple of weeks to compute. We computed A and B, what their theory was. We went to a lot of work and here they say, "We may have something else involved."

The Court: You just got through saying a few minutes ago they were entitled to the most favorable rate, whatever it would develop to be, but now your point is you would be prejudiced [64] by lack of time?

Mr. Rader: Absolutely. They have to plead it. Tell us what their proposition is.

The Court: Well, the amendment will be allowed, but if it develops that you are prejudiced, why, the court will take appropriate action of one kind or another.

Mr. Hellenthal: Now, your Honor, paragraph 9. Your Honor has ruled, have you not? Mr. Cottis thought you had not. I don't want to interrupt you.

The Court: Yes, I have ruled that the amendment will be permitted, but if it appears that by reason of making these amendments at the 59th minute the defendant has been prejudiced in his defense, why, the court will have to take appropriate steps to wipe out that prejudice.

Mr. Hellenthal: One thing for the record. Counsel for the defendant indicated that this had not been agreed to at Monday's conference. We should like to show in the record that it was agreed to at Monday's conference.

The Court: What purpose would be served by that? The court is not going to go into any collateral disputes here.

Mr. Hellenthal: I merely wanted to make that statement for the record. Paragraph 9.

Mr. Rader: I won't admit that. They can prove it.

The Court: You say you will admit it?

Mr. Rader: I won't. [65]

Mr. Hellenthal: Your Honor, we have some 70 or 80 letters here of protest from each corporation that were submitted monthly with the checks for utility services to the defendant and on which an acknowledgment of receipt has been signed in each case by a City clerk and I suppose this forces us to introduce the 70, 80 or 90 letters in evidence.

The Court: Why won't the defendant admit that?

Mr. Rader: If he will put those in a bundle for me I will look at them tonight and maybe I can admit them.

The Court: You mean you have no knowledge or no one in the City has no knowledge?

Mr. Rader: I am not certain, but maybe someone in the City does have knowledge. The City, if it please the court, has 300 or 400 employees and it is pretty hard for me to know whether they have knowledge of something or not and I think it is a lot easier for them to show me the file on which the protest is based. I will check the accuracy of the same and I will stipulate they sent the letters they claim they sent.

Mr. Reischling: We have 2 files and counsel can look at it in 2 seconds.

Mr. Hellenthal: The originals are all with the City.

The Court: Well, but are these payments with which protests are transmitted made to one employee of the City or to one office?

Mr. Hellenthal: The letters are submitted to the [66] City Clerk-Treasurer, City of Anchorage. All utility bills are paid to the City Clerk-Treasurer.

Mr. Rader: I will be prepared to stipulate to this in the morning I feel sure.

Mr. Hellenthal: Fine, we will let it go. Now, the next paragraph is Number 11 and we presume that since the City objected and will not stipulate to paragraphs 6, 7 and 8, and based upon that assumption, I move that the complaint be amended so that in the 4th line of the prayer for relief the words, "most favorable," be substituted for the word "commercial."

The Court: The amendment will be allowed subject to the same condition.

Mr. Hellenthal: Now, your Honor, the next matter we wish to bring to the court's attention in the pre-trial conference is the Notice of Demand to Produce, a copy of which is in the court's file, and I ask counsel for the defendant if the electrical rate schedules specified in A, B, C, D and E of paragraph 1, together with all other matters sought in paragraph 1, have been produced in court?

Mr. Rader: Counsel knows as well as I do what we have produced here. I think everything is there. You can answer that as well as I can. If it has been produced it is in evidence here in our exhibits.

Mr. Hellenthal: I ask counsel for the defendant if the matters referred to in paragraph 2 of the Demand to Produce are [67] present in court?

Mr. Rader: I can't state whether they are or

are not. Since receiving this at 2:30 yesterday I have tried to find out what we have and I have a significant portion of it. Whether or not there is more I honestly can't say.

Mr. Hellenthal: Could we then, please, have what materials you do have in court?

Mr. Rader: Do you want a copy of the National Electrical Code?

Mr. Hellenthal: Indeed I do.

Mr. Rader: I assume this will be returned or you will pay for it?

Mr. Hellenthal: I can't guarantee it.

Mr. Rader: Incidentally, I'd like to have this document marked as Defendant's Exhibit I, I believe, called "Ordinance No. 55 of the City of Anchorage."

Mr. Hellenthal: Your Honor, now my interpretation is that the fact we ask for a document doesn't automatically make it an exhibit in this case.

The Court: Well, it wouldn't, but do you object?

Mr. Hellenthal: Yes, I do. I haven't seen it.

Mr. Rader: It is only for identification.

Mr. Hellenthal: You didn't say that. As long as it isn't an exhibit it is all right with me.

The Court: You mean there is some ordinance that [68] contains these rules and regulations? Is that what you offer?

Mr. Rader: Yes.

The Court: It will be admitted in evidence. I don't know why you should quibble over that.

Mr. Hellenthal: I know it was repealed. That is why I am quibbling over it. I know Ordinance 55

was repealed in 1949, if that is what it is. I haven't seen it, but I strongly suspect it is Ordinance 55.

Mr. Rader: If it please the court, I meant to say, if I didn't say, that should be offered for identification because I know that there will be an argument as to its repeal and whether or not it is still effective. That is why I meant to ask it be marked for identification.

The Court: There is no use in marking it for identification. It will be marked as an exhibit just as any other exhibit in the case. Even though it was repealed it probably would apply to at least a part of the period.

Mr. Hellenthal: No, it was repealed in 1950 at least.

The Court: Well, there is a dispute over that so I am not going to resolve the dispute.

Mr. Hellenthal: Of course, we will save all objections as to competency and the works.

Mr. Reischling: As long as the exhibit has been introduced, may I see it?

Mr. Rader: I would like to ask counsel if they could [69] stipulate that the National Electrical Code has been the code of the City during the period in question?

Mr. Hellenthal: The National Electrical Code, to the best of my recollection, was enacted by the City in 1949, and I will so stipulate.

Mr. Rader: I assume that in that Notice to Produce that that includes only those in effect up to the present time and not the ones which I assume will be put into effect?

The Court: What are you referring to now? Are you referring to rules and regulations?

Mr. Rader: Yes.

Mr. Hellenthal: Prospective rules and regulations I don't think are material.

Mr. Rader: We have some that are published and are prospective.

Mr. Hellenthal: Have they been duly enacted by the City Council, promulgated and passed and approved by the City Council pursuant to City Code?

Mr. Rader: Yes, they have been approved, however, the effective date is May 1, 1955.

Mr. Hellenthal: But were they passed and approved under Article 3, Chapter 3 of the City Code?

Mr. Rader: I believe they were.

Mr. Hellenthal: I doubt they are material, but I would like them made a part of the record. [70]

The Court: I think that somebody ought to have some idea in what respect they will be material.

Mr. Rader: I don't know in what respect they will be material.

Mr. Hellenthal: I don't either.

The Court: Let's defer it until it becomes evidence itself.

Mr. Hellenthal: Could I have an opportunity to formally inspect it? I have not seen it before. Do you have anything further in connection with the Demand contained in paragraph 2 of the Notice of Demand to Produce?

Mr. Rader: Those matters contained in the General Code—which you have.

Mr. Hellenthal: You have nothing other than which you have published—ordinances of the City?

Mr. Rader: To the best of my recollection. Again, your Honor, I don't want to be foreclosed from producing something if I find something because if it is material—this was given to me yesterday afternoon and I turned it over to whoever was around to gather this up.

The Court: You want to agree with this reservation?

Mr. Rader: With the reservation if I find any more they will be produced.

The Court: Under the circumstances I think it will have to be accepted. [71]

Mr. Hellenthal: Do you have any documents in mind that might possibly be material that you are worried about?

Mr. Rader: No, I don't.

Mr. Hellenthal: Now the matter covered in paragraph 3 of the Notice of Demand to Produce.

Mr. Rader: Yes, I have the original.

Mr. Hellenthal: May we have that please, or may it be marked in the record in the case?

Mr. Rader: I will have it available for you when you get ready to introduce it. That is a notice to produce and that is all I will do for you.

Mr. Hellenthal: We are trying to help the court.

Mr. Rader: I am going to make you introduce that. It has a lot of hearsay in it and a lot of improper facts and I want your——

Mr. Hellenthal: Can we see it?

Mr. Rader: It is identical to the copy you showed me yesterday.

Mr. Hellenthal: May we see it, please?

Mr. Rader: Is that the one you are referring to?

Mr. Hellenthal: Yes. I believe this should be marked for identification or perhaps marked in some other way.

Mr. Rader: You have an idea I am going to——

Mr. Hellenthal: I think I am entitled to use it for what it is worth. [72]

Mr. Reischling: At any rate it would be in proper order to mark it and subsequently refused, but I think it at this time should be marked, it having been produced.

Mr. Rader: You are correct.

The Court: Well, as I understand it, then you anticipate that you will object to its introduction in evidence?

Mr. Rader: Yes, your Honor.

The Court: Well, so long as you are going to do so, it can only be marked for identification.

Mr. Hellenthal: That, your Honor, of course, is exactly the same objection we made to Ordinance 55. We will probably object to it on the ground that it has been repealed and we don't want it since it has been.

The Court: I don't think the situation is at all like this one. We know it is going to be disputed as to whether it was repealed and in order to pass on that question we have got to have the Act that is said to have been repealed.

Mr. Hellenthal: Yes, and there may be other questions on that as to materiality. Not having read it I can't tell.

Mr. Rader: Is that Plaintiff's Exhibit No. 1?

The Deputy Clerk: Yes.

Mr. Hellenthal: Now what is Ordinance 55 marked as?

Mr. Rader: Defendant's Exhibit I. Is that correct?

The Court: Yes, it should be I.

Mr. Reischling: It has not been marked for identification. [73]

Mr. Hellenthal: It has been marked as an exhibit. Now, to get our record perfectly clear I think we should also mark the 1953 edition of the Electrical Code in some manner. It is going to be some part of the record in this case and I think it should be marked.

The Court: Well, apparently there is no objection to it.

Mr. Rader: No.

Mr. Hellenthal: I don't want to be fuddy-duddy, but I want to make a good record. I don't want to try this thing in a sloppy fashion.

The Court: It may be marked. I guess that will be J.

Mr. Hellenthal: And I think also that the electrical rates and service conditions effective May 1, 1955, which was passed and approved by the Council, apparently in January or February of this year, should also be marked.

The Court: I have already ruled on that, so let's go to something else.

Mr. Hellenthal: Now, in answer to paragraph 4 of the Notice of Demand to Produce.

Mr. Rader: I have that.

The Court: Can you agree on its introduction or is there going to be a dispute about that?

Mr. Rader: Well, I think most of it is hearsay and most of it is immaterial. I don't agree to its introduction. We have here some opinions of persons not present in court and we [74] don't have the opportunity to cross-examine them on it; whether they are experts I don't know.

The Court: It is not inadmissible for those reasons because where there is no inquiry the party may offer it for whatever it may be admissible for. The court will only consider the part that is admissible, so if you want to make your objections now to the part that you think is inadmissible it may be ruled on.

Mr. Rader: If it please the court, what it consists of is a letter from our electrical superintendent to the National Fire Protection Association and a reply, both in 1954, in which the opinion of one Merwin Brandon was expressed. I don't consider it competent and I certainly wish he were in the courtroom and we would cross-examine him on it.

The Court: You mean it consists only of a matter of opinion?

Mr. Rader: Actually it does. I have the letter here if your Honor wishes to read it. It says, "On that basis, I am expressing my personal understanding of the situation and the Code intent in the hope that it will be helpful. If for any reason you

find that a formal interpretation is necessary or desirable, one could later be requested in line with the Interpretation Procedure in the Appendix to the National Electrical Code." All we have here is a personal opinion of somebody who is maybe more than a clerk and maybe not, I don't know.

Mr. Reischling: May I be heard on that, your Honor? [75]

The Court: Yes, you may point out what you think is admissible.

Mr. Reischling: If the court please——

Mr. Hellenthal: Your Honor, let me first interrupt. I may be wrong in my basic interpretation of the rule as regards to the production of documents, but I think that the rule exists so that certain documents can be obtained, studied, considered by counsel in the case and then used if admissible. I certainly, when I made this Notice to Produce, didn't make any attempt to get something into the record of this case.

The Court: Why didn't you say so when the matter was first mentioned? Of course, that is true. It is true that you can demand production of documents or papers that you don't have any intention of introducing because it may lead to something else, but here in view of the statement of counsel I thought that it was a question as to whether or not it would be admissible.

Mr. Hellenthal: That, your Honor, is why I have always asked that these papers be marked for identification. I have never seen these.

The Court: There is no need in marking them for identification if all you want to do is look at them.

Mr. Hellenthal: I just want to look at it. That is all I want to do. Now, in connection with paragraph 4, the replies to the letter of July 17, do you have them? Do you have the replies to the letter of July 17, Mr. Rader? [76]

Mr. Rader: Replies?

Mr. Hellenthal: Do you have the reply or replies?

Mr. Rader: Why don't you look at what I gave you and see if you have what you want?

Mr. Hellenthal: Do you have the reply or replies there to that I asked for in my Notice?

Mr. Rader: I don't know what he asked for in his Notice. I gave him what he asked for. I gave it to him. I don't know whether he has it or not. If you want something more I will get it.

Mr. Hellenthal: Is there further correspondence?

Mr. Rader: To my knowledge there is not.

Mr. Hellenthal: I have here—let me see what I have here—I am trying to hurry it up, but I guess I am going to have to see——

The Court: Well, if you don't want to introduce them in evidence you can examine them at your leisure. You don't need to examine them on the time of the court.

Mr. Hellenthal: Now, Mr. Rader, do you have any additional correspondence other than this in connection with the problem raised by Mr. McKinley in his letter of July 17 addressed to the National Fire Protection Association?

Mr. Rader: If it please the court, there are 15 files over there of correspondence of the National Fire Protection Association concerning electricity and hook-ons and everything else. This is the letter that he requested, our request to them [77] for a certain statement and their answer to us. Now, I don't know what those files may contain beyond that.

The Court: You mean you are enlarging the demand now?

Mr. Hellenthal: No, I am not, your Honor.

Mr. Rader: No, his demand is so large that in a matter of 14 hours it is impossible. If we went through all the correspondence and files we may find some more. We are going to keep looking if there is anything else in there, but at this time I don't know.

The Court: You mean now you are discussing that part of paragraph 4 that relates to additional correspondence?

Mr. Rader: Yes.

The Court: Well, that is too indefinite. We will just ignore that. Let's go to the next one.

Mr. Hellenthal: The bond requested in paragraph 5, bond or bonds if they are available.

Mr. Rader: I have bonds here.

Mr. Hellenthal: May I have them?

Mr. Rader: Before I give away City bonds which are a part of our file, I'd like to ask counsel if their own records don't show the bonds that they gave to the City? Then they should show them. I don't know why we should have to pull out original files

of their bonds and haul them around. If they don't have those in their own files they can use ours, I guess, but I'd like to ask them, before they ask me to produce, whether or not they have gone [78] through their own files to find out whether or not they have the copies.

Mr. Hellenthal: We have copies and drafts of them. We don't know what original form was produced. Will you stipulate that one bond was required of the corporations, the two corporations?

Mr. Rader: No, I think there are several bonds.

Mr. Hellenthal: Now, I have no objection, your Honor, if their bonds stayed lodged with the Clerk of the Court so that we can, with permission, examine them at reasonable hours. I don't want to burn them up. I don't want to have the responsibility of losing them.

Mr. Reischling: If the court please, of course, at any time an exhibit may be withdrawn with the consent of the court. If it becomes necessary in the trial of this case so that the court may have the benefit, and we can put it in the record, these bonds could be introduced, but I will have no objection to the City withdrawing the bonds after this case is over if the City so desires.

The Court: Well, is there Notice to Produce under Rule 34?

Mr. Hellenthal: It is under the Territorial Rules, the Uniform Rules of District Courts.

The Court: I am referring to the Federal Rules now.

Mr. Hellenthal: It is in the language of—both are uniform rules of the District Courts and the Federal Rules and I [79] don't know the number, your Honor. I can't remember it.

The Court: Well, it is 34. I think that you should show how they are material, necessary to your defense. That is one of the requirements and I notice that it is over that aspect of this demand that so much dispute developes. Now, for instance, why is it necessary for you to have this bond?

Mr. Hellenthal: I will explain our theory. The City takes the theory that the corporation plaintiffs, the two corporation plaintiffs are not customers, but that the buildings are customers. To be consistent the City should require one bond from each building, but they don't do that. There is one bond per plaintiff and we think that is decidedly material.

The Court: All you need to do then is to ask if that is the situation without producing the bonds.

Mr. Hellenthal: We might get into the situation they didn't have time to look through voluminous records. We want to give them the time to look into these things.

The Court: It certainly wouldn't require any more time to admit whatever the fact is in that respect than look for the bond itself.

Mr. Rader: If that is what they want we will admit that each corporation has up a bond to cover utility obligations in the City of Anchorage.

The Court: I think that is sufficient.

Mr. Rader: Here are additional bonds. [80]

Mr. Hellenthal: Your Honor, can I pass to the next? We are checking the bonds now to see what stipulation will cover it.

The Court: You may pass to the next one.

Mr. Hellenthal: The minutes of the council meeting of November 9, 1951.

Mr. Rader: I will stipulate they can be offered in evidence.

Mr. Hellenthal: I think we better be consistent on this.

Mr. Rader: If you want to introduce them you can call a witness.

The Court: Well, I am waiting to hear whether there is any agreement here as to this last item.

Mr. Hellenthal: I can't so stipulate until I see them.

The Court: We will recess at this time for 10 minutes.

(Whereupon, at 3:11 o'clock p.m., following a 10-minutes recess, court reconvenes and the following proceedings were had.)

Mr. Hellenthal: Now we have the minutes of the council meeting. Do you have the tape recording of the proceedings?

Mr. Rader: We don't. At least not to our knowledge we don't have it. Now, we have a lot of tapes over there and I will admit the procedure, your Honor, is generally at the council meetings there is a tape recorder that is on most of the time, not all of the time. The City Clerk generally uses it to check [81] his minutes later on to make sure that

his notes agree with the tape. We have a number of tapes and since yesterday afternoon—those tapes are sometimes hard to determine what is on a tape because you have to put it on the machine, unless they are indexed properly, and go all the way through—so at this time we don't have a tape. We don't know of a tape. There may be one. If there is we will produce it.

Mr. Hellenthal: That is satisfactory.

The Court: Do you want the minutes introduced in evidence?

Mr. Hellenthal: I will have to read them first. I haven't had a chance to read them.

Mr. Rader: They are certified as correct by the City Clerk.

Mr. Hellenthal: They may be introduced in evidence. May I have a copy?

Mr. Rader: Yes.

The Court: They will be admitted as Defendant's Exhibit K.

Mr. Reischling: If the court please, I will ask that the letter of July 19, 1954, addressed to the National Fire Protection Association of Boston, Massachusetts, and signed by William H. McKinley, Superintendent of the Electrical Department, together with the reply to that letter, dated July 27, 1954, addressed to Mr. McKinley, Superintendent of the Anchorage Electrical [82] Department and signed by Merwin Brandon, the man to whom the first letter was addressed, be marked as Exhibit L for identification. This is the letter, the series of letters that counsel conceded we had the right to

have marked for identification and about which some question may later arise as to the admissibility of certain portions of it.

The Court: Then, as I understand it, you concede that a part of this letter is admissible?

Mr. Rader: I don't concede that any part of it is admissible.

The Court: Then you better object now. I mean, if it is going—if you are going to object to the admissibility of whether it is offered in evidence I think we might have the objection now because it is preferable on pre-trial conferences not to merely mark documents for identification, but have them admitted as exhibits. So if you take the position now that no part is admissible, I think we ought to thrash that out here and now.

Mr. Rader: I have no objection. If they want to use the letter from Mr. McKinley for impeachment in his examination they can use it, but he is in court and will be in court so I concede it serves no purpose and is not and should not be a part of the record. As to the reply, it is a reply from someone, I think in Boston, Massachusetts, as to a technical matter and I object to that on the ground it is completely hearsay.

The Court: Will you state the purpose for which you [83] think it should be admitted?

Mr. Reischling: Yes, your Honor. The evidence in this case will disclose the fact that the City at one time took the position, as an excuse for refusing to give us combined billing, that there was something in the National Electrical Code which required

we have a single meter and with single meters we could not have combined billing.

The Court: Could not have what?

Mr. Reischling: Combined billing of all of the meters that serve, we will say, Panoramic View Corporation, that is, all of the power used by the corporation and in a corporate capacity could not be charged to us as one customer, but that they would have to charge it to us as though we were 14 separate individual owners. The rules and regulations of the City of Anchorage which the City contended supported that position are to be interpreted any way you want to look at them, are ambiguous, that is, perhaps at least they did not support the City's position. The City, therefore——

The Court: You are referring now to the letter as being ambiguous?

Mr. Reischling: Yes. The City, therefore, in an effort to solve that ambiguity wrote to this particular expert organization for interpretation of those particular sections of the National Electrical Code which they contended supported their position. The letter, copy of which was produced by counsel [84] today, together with the answer to that letter is a direct refusal on the part of these particular experts to concede or to admit that the National Electrical Code had anything whatsoever to do with this particular problem. In other words, the City itself sought to solve or to get support for the position which they took. It is interdepartmental communication. Knowledge of the City, I think, can be used and is admissible to show that the City actually has

no reasonable basis upon which to take the position it insists upon taking, and this letter shows that the National Electrical Code or Safety Code upon which they have based, in part at least, their refusal to give us proper billing does not say what the City contends that it does say. I believe that under the circumstances that that information and that opinion, which the City itself sought in aid of its own case, is relevant here to aid the court in seeing and knowing the City's state of mind at that time and since that time.

The Court: But what isn't clear to me is, as I understand it, the City wrote seeking an interpretation of some part——

Mr. Reischling: Of the National Electrical Safety Code.

The Court: What kind of advice did they get?

Mr. Reischling: They got the reply that is attached to that exhibit. It had nothing whatsoever to do with the particular position that they took, that is, they said it was a matter for the local administrative or electrical authorities to determine, but the opinion is not helpful to them and I believe, under the [85] circumstances, it is admissible.

The Court: Well, but it is admissible for what purpose? You mentioned to show the position of the City or the attitude of the City at one time, but the position of the City or the attitude at one time isn't necessarily relevant or competent unless it is connected up with some other evidence.

Mr. Reischling: We can connect it, your Honor.

The Court: How?

Mr. Reischling: Through their witnesses at the time their witnesses are called.

Mr. Hellenthal: To put it in a nutshell, your Honor, the request that plaintiffs made was denied by the City for the very simple reason that the National Electrical Safety Code, which is an ordinance of the City, prohibits the granting of this request. The City finally was induced to write a letter, as they always do in questions of code interpretation, to see if that was true or false and the answer came back. The code has nothing to do with it and they wrote to the people that make the codes.

The Court: Well, I understand now and all it means is that the City was mistaken in its position at that time.

Mr. Hellenthal: That is very material.

The Court: Why is it material?

Mr. Hellenthal: Because they never rectified their mistake.

The Court: But they never admitted the mistake. For [86] instance, here is the situation as has been explained to me, at least as I understand it: The City took a position for which it sought support and it failed to get that support. That doesn't mean that the City should recede from its position merely because they failed to get support somewhere.

Mr. Hellenthal: We are not asking the City to recede from its position, but we are going to prove that the City's position is 100 per cent wrong.

The Court: Well, then you can do it without this letter.

Mr. Hellenthal: I wonder.

The Court: This letter wouldn't show it, it seems to me.

Mr. Hellenthal: It certainly isn't conclusive, but it certainly tends to show it. Your Honor, may I for a moment digress? In modern cities a practice has grown up of adopting the National Codes. We have in Anchorage, for example, the Uniform Specific States Builders Code. The City also has the National Electrical Safety Code, the National Electric Appliance Code, they have the Uniform Plumbing Code and perhaps one other National Code. Off-hand I can't think of it. The plans for new buildings in the City of Anchorage are not approved by the Anchorage Building officials, but they are approved by an authority in Los Angeles which has that right pursuant to the provisions of the Uniform Specific States Builders Code. That is why the practice has grown up of consulting the code officials; irrespective of its legality or practicability that is what happens. In this instance they [87] wrote to the code authority in 1954 and the code authority said, "Your contention is not correct." Now, according to our theory of the case that was the contention that had been advanced by the City since 1951 and before as the reason for denying the privilege of combined billing to our client plaintiffs.

The Court: I understand all that, but if it merely amounts to this, as I said before, that the City failed

to get the support or, you might say, confirmation in its opinion from the National Board, now, that doesn't make it relevant evidence against the City. It just simply leaves the City where it was before it wrote the letter.

Mr. Reischling: If your Honor please, may I suggest that under the law governing the admission of expert testimony, this is the City's own expert. Now, after all, they asked for an opinion from an expert and it is true that it may only be an opinion and the weight of the opinion may be for the court, but that does not have any effect upon its admissibility.

The Court: How can it be an opinion when all it amounts to is a negative reply or a reply? We don't have anything to do with it. How can that be an opinion?

Mr. Reischling: It states, "In our opinion the National Safety Code does not apply."

The Court: What value is an opinion of that kind? Absolutely nothing.

Mr. Reischling: Well, it is—— [88]

The Court: It doesn't contain a bit of affirmative matter. It is just simply a negative proposition that has no evidentiary value whatever.

Mr. Rader: If it please the court, there has been a lot of innuendo here that the City was not supported by this opinion. This man is giving a personal opinion and saying if we want a formal opinion we can go ahead and get one. Now, they were well aware of this letter. There is no question about that. This has never been a secret. If they want a

formal opinion they can get one as to the result of this thing. The man is not here to cross-examine, consequently I don't like to put his opinion in evidence, but he does support the City and he does say that from a safety standpoint the fewer service connections to a building the better. Isn't that what you gentlemen were saying that they reversed?

Mr. Hellenthal: No, it isn't what we were saying.

Mr. Rader: I misunderstood.

Mr. Reischling: They say the National Safety Code has nothing to do with this problem.

The Court: As I say, it leaves the City and the problem right back where it was before the letter was written.

Mr. Reischling: We merely ask, if the Court please, at this time it only be marked for identification.

The Court: There is no use marking it for identification if it doesn't have any more probative value than that. Of course, it may be offered, but in the meantime it will not even be marked for [89] identification. Let's go on to the next item.

Mr. Hellenthal: Paragraph 7, the documents requested there, please. We don't want the court to get the impression the City has not co-operated with us. We have these documents and they are in copy form already and we want the originals.

The Court: Is there any reason for having the originals?

Mr. Hellenthal: Yes.

Mr. Rader: You better mark these separately. I have given first contract with Civil Aeronautics Administration and City of Anchorage.

The Court: Are you agreed that that may be offered in evidence?

Mr. Rader: Yes.

The Court: Well, it may be given the next number which will be L.

Mr. Rader: And a map document designated 8D-31-3E, Civil Aeronautics Administration. I do not admit that the document—it was not attached to the contract with C.A.A. C.A.A. had the only copy of it and they admit it had not been attached, although it is referred to in the contract.

The Court: Is that a plat or something?

Mr. Rader: Yes, it is a map.

Mr. Cottis: It is referred to in the contract as being attached.

The Court: Well, they may be marked as one exhibit, [90] Exhibit L.

Mr. Rader: Now, if it please the court, the balance of that paragraph in the Notice to Produce, "plus any other contracts entered into by the City of Anchorage for sale of electric energy." We have files over there which have contracts in them; most of them are government contracts.

The Court: Well, you need not discuss that. I have already held in connection with another item of this kind it has got to be specified. It is too indefinite. Well, I suppose that disposes now of—

Mr. Hellenthal: Your Honor, can't those files containing those contracts be made available to us for inspection at the City Hall?

Mr. Rader: Well, the only thing, we insist you not take them out of the files. We are billing all the time on them and we have a lot of old ones that are carefully filed and have attached memoranda. You are welcome though to dig through them. We don't want a dozen of you in; one or two of you can fit in that office without stopping things.

The Court: Is this a case where you are going to look for some particular contract or where any contract will do?

Mr. Hellenthal: Particular contracts, your Honor.

The Court: Well, if it was a case where any contract would do there would have to be proper demand, but not otherwise.

Mr. Cottis: If the court please, paragraph 5 of the [91] Notice to Produce was on the bond. Now, maybe Mr. Rader would agree to this stipulation: That originally one bond was furnished by Anchorage Rental Service, as agent for Richardson Vista Corporation and Panoramic View Corporation, covering these utility services to these projects.

Mr. Rader: 2nd of April, 1953. I don't think it is material.

Mr. Cottis: I don't think the dates are too important. As I understand it, originally one bond was put up for the two projects and one recently—two bonds—one for each of the two projects.

Mr. Rader: Just take the dates so there won't be a misunderstanding.

Mr. Cottis: I don't think we have it all the way back.

Mr. Rader: That is all I know of. There may be more, but those are the current bonds.

Mr. Cottis: Well, will counsel stipulate——

Mr. Hellenthal: Just a minute——

Mr. Cottis: March 4, 1952, that has been the situation and before that there was a cash bond up for the projects.

Mr. Rader: I will stipulate that each corporation put up a bond of either cash or qualified surety for payment of their electrical utility bills. Is that enough?

Mr. Cottis: And only one bond?

Mr. Rader: No, there are two bonds. [92]

Mr. Cottis: Originally just the one.

Mr. Rader: Originally they consolidated and both Richardson Vista and Panoramic were on the same bond. Subsequently and in recent years they have——beginning with 1954 they put up individual bonds.

Mr. Cottis: That is two bonds; one covering each of the projects.

The Court: You say those two were put up in 1954?

Mr. Rader: Yes, one for each project. Prior to this they had been put up jointly.

Mr. Cottis: Prior to that one bond had covered both projects.

Mr. Hellenthal: Is that correct?

Mr. Rader: Yes, I think so.

The Court: Well, is there any other matter, question or issue on which the parties can agree?

Mr. Hellenthal: Now, at this conference—I think

we are holding up the matter on the letters, the monthly letters of protest. Mr. Rader, can we agree that the first written protest was delivered to the City early in November, 1951, read at the council meeting of November 9, 1951, and get the letter that I gave to you in evidence? Do you have the original of the letter of protest?

Mr. Rader: I handed it to you a few minutes ago.

Mr. Hellenthal: Perhaps it was put in. I don't recall [93] it, though.

Mr. Rader: I gave it to you.

Mr. Hellenthal: Is that the one with the attachment? I withdraw that. It is in the record as an exhibit.

Mr. Cottis: Plaintiff's Exhibit 1 for identification only.

Mr. Rader: Now, if your Honor wishes to hear objection I will make my objection on that also.

The Court: What is that exhibit?

Mr. Rader: Plaintiff's Exhibit No. 1 for identification. I assume if we put it in for identification we reserve our objections to the time they are introduced.

The Court: What is that letter?

Mr. Rader: The letter is a protest and has attached to it a yellow sheet of paper which purportedly represents a certain situation in the States.

The Court: You want to object to it on what grounds?

Mr. Rader: I object to the attached purported wire for the fact it is absolutely hearsay and I have

definite knowledge the contrary is true. The wire does not state the fact. The letter may be introduced as being an official document delivered to the City Council.

The Court: Do counsel have anything to say as to the remarks of counsel for the defendant as to the admissibility of the copy of the telegram? [94]

Mr. Cottis: Yes, your Honor, it is part of the letter. It is referred to in the letter and in effect incorporated into the letter by reference.

Mr. Rader: I will stipulate that the letter with that attached yellow sheet was given to the persons named. I think it was addressed to the City Council.

The Court: Where in the letter is that referred to?

Mr. Cottis: I'd have to look at it, your Honor.

The Court: Well, I can.

Mr. Rader: I believe it is referred to all right. I certainly don't admit the facts stated in that wire though.

The Court: Well, I think the objection is well taken. The fact it is referred to in the letter doesn't make it admissible.

Mr. Cottis: It is part of the letter and we are offering it, not for its contents, but for the document itself. In other words, the City had that before it as the original protest and made no further move to investigate it, just arbitrarily turned it down.

The Court: But the protest is sufficient in itself. If it is merely a protest it doesn't have to be supported by anything of that kind.

Mr. Cottis: But, your Honor, as was stated about

other exhibits, the court wouldn't give unjustified weight to the attachment. I would simply think that the entire document should be admitted then the portions that are relevant, even if they are [95] the first and third sentences, would be the ones that would be considered.

The Court: It seems to me the only purpose for admitting anything of that kind would show there was protest and what argument would be made in support of the protest is immaterial. That is all this is. That is all the telegram is. If this letter isn't offered for any other purpose than to show there was protest lodged with the City, why, the telegram is inadmissible. It doesn't serve any purpose. This letter will be admitted for the purpose of showing that a protest was made and not for the purpose of showing the truth of any of the statements made therein.

Mr. Cottis: And may the attachment to the letter be marked for identification, your Honor?

The Court: Well, what good will that do?

Mr. Rader: I object to that. It is not the best evidence. I'd like to see them produce the wire.

Mr. Hellenthal: I have the wire.

The Court: I have already sustained the objection to it.

Mr. Hellenthal: Well, your Honor, as a purely academic matter it is, frankly, a difference of opinion on this matter. Some men whose opinion I respect say the letter should—the wire should accompany the letter. I am inclined——

The Court: I don't think there is any authority of that kind and besides I am passing on this, not somebody else.

Mr. Hellenthal: However, your Honor, just for the sake [96] of the record let us assume that in some aspect of this case we did not prevail and an appeal were necessary. I think we should show in the record what matters were offered even though I agree with your Honor, but all lawyers don't think that appendix might not be relevant.

The Court: I have ruled on it. If you want to offer it in connection with an offer of proof, why, you may do so, but it is not going to be a part of the exhibit.

Mr. Hellenthal: Now perhaps Mr. Rader has something he can think of that would expedite the trial of the factual matters. Now, the situation, as I see it, your Honor, is that we have reached some sort of a, using the proposed stipulation as a guide—we have covered everything as far as I see it. The only paragraphs that no stipulation has been obtained are paragraphs 6 and 14. Now perhaps if Mr. Rader has something that will expedite it we can do that, otherwise, we are ready to close.

The Court: When you refer to paragraphs 6 and 14 you refer to the proposed stipulation?

Mr. Hellenthal: We agreed at our Monday morning conference there was nothing we could stipulate to as to that. The only things remaining are 6 and 14. That is merely for the court's information.

The Court: You are referring to paragraphs 6 and 14 of the complaint?

Mr. Hellenthal: Yes. No stipulation can be made

there [97] so far as I am concerned, at the pre-trial conference. I have done what I want to do.

Mr. Rader: I have nothing, your Honor. I assume that after they close this case I will have, perhaps, additional documents, but we can take those up at that time.

The Court: Well, if you have any evidence to produce, why, now is the time to go ahead with it.

Mr. Hellenthal: Any what?

The Court: Evidence. Are you ready to rest, or are you——

Mr. Hellenthal: No, I suggest we get some opening statements in here somewhere.

The Court: If you feel that an opening statement should be made you may do so, although it seems to me with all the discussion I have a pretty good idea of what it is about, but you may make your opening statement.

(Whereupon, opening statement was made by Mr. Hellenthal, of counsel for the plaintiffs.)

(Whereupon, opening statement was made by Mr. Reischling, of counsel for the plaintiff, Panoramic View Corporation.)

(Whereupon, opening statement was made by Mr. Rader, of counsel for the defendant.)

The Court: Well, we will adjourn then to resume this [98] case at 10:00 o'clock tomorrow morning.

(Whereupon, at 4:54 o'clock p.m., the court continues the cause to 10:00 o'clock a.m., Friday, March 25, 1955.) [99]

The Court: You may proceed with your case.

Mr. Hellenthal: Your Honor, at this time the City is prepared to stipulate with regard to the matters that were held over yesterday as to protested payments. Both parties agree that the first payment of utility billings for Panoramic View Corporation and Richardson Vista Corporation was made under protest by Lela Hall as managing agent for the two corporations d/b/a under the name of Anchorage Rental Service and that each payment was protested by means of a formal letter of protest each month thereafter until May, 1954, after which such date Panoramic View Corporation protested in exactly the same manner by means of monthly formal letters up until the present day through its managing agent, Mr. St. Amor, and Mr. Winn prior to him. And that plaintiff Richardson Vista Corporation following May, 1954, made the identical protest monthly in formal fashion through its agent, Mr. Harland, and further that the protest letter—the form used monthly read as follows——

The Court: Well, if you agree they protested what difference does it make what form the protest was made?

Mr. Rader: If it please the court, like so many other times here the stipulation, so far as I am concerned, is misunderstood. I am willing to stipulate that we take one of these typical letters and put it in evidence as an exhibit and stipulate that similar letters were received by the City of Anchorage every month from both [101] of the corporations and that it was continuing, but I am not stipulating it was continuing protest as to necessarily the matters which may be tried in this lawsuit.

The Court: Do either of you contend that the form of protest makes any difference?

Mr. Rader: I think it does. There is a difference between protesting one thing and another thing.

The Court: All we are concerned with here is protest in payment.

Mr. Rader: Well, but there has to be a reason for the protest.

The Court: You mean that this particular matter involves the legal sufficiency of the protest?

Mr. Rader: It may very well involve the legal sufficiency of the protest. That is the reason I agreed to stipulate to the fact that they were received and that is all.

The Court: By the way, what is the significance of May, 1954?

Mr. Hellenthal: Merely this: That Mrs. Hall then went to Seattle to other work and she was replaced by her successor, Mr. Quinn of Panoramic View, and Mr. Harlon for Richardson Vista. That is the only significance—no legal significance.

The Court: Well, I thought that since it was said that after that date the plaintiffs acted separately instead of by one agent that something had occurred. [102]

Mr. Hellenthal: There was a separate agent for each plaintiff after May of 1954.

The Court: I see. Well, then have the parties agreed in accordance with the statement of counsel for the defense?

Mr. Hellenthal: Yes. I would like to introduce a typical protest.

Mr. Rader: If it please the court, I don't believe this is a typical protest. You can introduce that one also, if you wish.

Mr. Hellenthal: All right, fine. The City receipted for each of these protests. Your Honor, I am kind of at a loss here because each time a letter of protest was delivered the City Clerk signed on the duplicate copy with the date on it, the original, of course, he kept, and I don't want to impose on the court but I submit these are——

Mr. Rader: These two may be combined and marked as one exhibit, Plaintiff's Exhibit No. 2, as being typical protest letter.

The Court: Well, now, maybe we ought to make certain that we have this stipulation in the record as modified. It is to the effect, as I understand it, that each protest was substantially in the form of the exhibit.

Mr. Rader: That is my understanding.

The Court: And that the protests made were in that form with every payment.

Mr. Rader: Yes. [103]

The Court: Very well.

Mr. Rader: If it please the court, because of the fact there are two plaintiffs here and lots of stipulating has been done I believe without a formal agreement of both the plaintiffs, I assume that the practicing procedure in here will be that the plaintiffs will be bound jointly unless one or the other objects to them being bound jointly.

The Court: Of course, that is true of law. If one

sits by he is deemed to acquiesce if he doesn't raise objection to it.

Mr. Rader: So long as that is understood.

Mr. Hellenthal: We should like this paper marked and offered in evidence pursuant to stipulation of the parties.

Mr. Rader: If it please the court, I suppose maybe 5 seconds ago I told Mr. Hellenthal I did not agree to it being offered in evidence. I do not consider it material. I admit its authenticity, but I do not admit its materiality to these proceedings.

Mr. Cottis: Your Honor, its materiality is that it shows that the two establishments with which we are concerned with here—it shows their relationship to the City, it shows the fact that they are more or less isolated from other buildings, that they are not just stores along a street in Anchorage, but that they have their own layout. This offered exhibit is a map compiled from aerial photographs and it shows the actual shape of [104] the buildings, their relation to each other, their relation to roads, railroads to the city business section, and I can't help but think it would be helpful to the court.

The Court: Well, it isn't apparent to me how it could be material; how these facts that you refer to could be material.

Mr. Reischling: If the court please, may I be heard on that?

The Court: Very well.

Mr. Reischling: This plan is illustrative only of the situation that exists in Anchorage, Alaska. Assuming that this case might go somewhere else, it is

necessary for whoever might be reviewing this case to have a realization of what the **geographical aspect** for—all it is for is to illustrate the exact situation as it is shown on that map.

The Court: I just can't see how illustrating a situation of this kind can possibly have any bearing on the issues here.

Mr. Reischling: Because of the law on the case that provides that certain classifications of a user of services may be based upon various factors and to show the similarity of the situation that exists here with reference to the length of the transmission lines; its distance from the power houses and so forth. That is relevant, and material, and competent to show the situation as it exists here in the City of Anchorage.

The Court: Do you dispute that?

Mr. Rader: Well, it is not my understanding of the law, [105] but there may be some law to that effect. I don't think it has any materiality, but it may have if counsel can connect it up.

The Court: Well, I would exclude it over the objection, but since counsel intimates that since it will become pertinent in view of the law that governs this case, it may be admitted for illustrative purposes. That will be Exhibit what?

The Clerk: Plaintiff's Exhibit 3.

Mr. Hellenthal: May the letters that were with the last exhibit, 2, be read at any time during the proceedings?

The Court: Well, if it becomes necessary to read them, but since they're in evidence, the court will read them at some time or other.

Mr. Hellenthal: Perhaps we should read them now.

The Court: For what purpose?

Mr. Hellenthal: Well, it will be proper for counsel to read them at any time hereafter.

The Court: If it becomes pertinent to have them read, yes, but I can't see any reason for reading the exhibits now.

Mr. Hellenthal: Mrs. Lela Hall, please.

LELA HALL

called as a witness for and on behalf of the plaintiff, and, being first duly sworn, testifies as follows on

Direct Examination

By Mr. Hellenthal: [106]

Q. Mrs. Hall, will you please state your full name? A. My name is Lela Mae Hall.

Q. Where do you reside at the present time, Mrs. Hall? A. I reside in Seattle, Washington.

Q. Mrs. Hall, will you tell the court what connection you have had and do have, if any, with the plaintiffs in this proceeding, Panoramic View Corporation and Richardson Vista Corporation?

A. On March 15, 1951, I was hired as management agent by the two corporations to leave Seattle and come to Anchorage to open the projects.

Q. What were your duties in connection with opening the projects first?

A. I prepared budget analysis, set up operating

(Testimony of Lela Hall.)

schedule, developed leases, contracts, and was management agent and representative in the community for the corporations.

Q. What were your functions in connection with the management of the projects?

A. Hired and fired crews, developed leases—lease department, executed all contracts necessary for the corporations with all agencies in the community.

Q. When did you assume your duties, Mrs. Hall?

A. I arrived in Anchorage in April, 1951.

Q. And you had been employed, if I understand you correctly, since March of 1951 engaged in preliminary work in Seattle? [107] A. Yes, sir.

Q. Do you now have any connection with plaintiff, Panoramic View Corporation, and plaintiff, Richardson Vista Corporation?

A. No, sir. I resigned in April of 1954.

Q. Your connections with the corporations ended at that time? A. Yes, sir.

Q. Now, Mrs. Hall, will you describe briefly the project, Richardson Vista Corporation?

A. Richardson Vista has 19 buildings, 22 units to a building on one site development on land lease from Fort Richardson originally.

Mr. Rader: We have stipulated to all that.

The Court: Yes, you have stipulated to all that.

Q. (By Mr. Hellenthal): And how are the buildings located?

Mr. Rader: We stipulated it is on the map.

Q. (By Mr. Hellenthal): Can you tell us, Mrs. Hall, why the buildings are located as they are?

(Testimony of Lela Hall.)

A. The project was financed under F.H.A. and in order to finance the project, there are requirements of F.H.A. on density and the buildings were laid out on a garden court type apartments.

Mr. Rader: If it please the court, without showing that she was involved in the laying out and was present when the buildings were laid out on the drafting board—she apparently came [108] here in April of 1951 and when the buildings were under construction. I think she is speaking of something which she has no knowledge, without a proper foundation; why perhaps foundation can be laid. I don't know, but it hasn't been laid yet.

The Court: It seems to me that since there is already evidence in the case that shows the layout that you can draw any inference you want to from those exhibits and argue these matters that you are now asking here to testify about.

Q. (By Mr. Hellenthal): All I want to know is why were the buildings laid out the way they are, if you know?

A. Density requirements on the part of F.H.A. I had the opportunity of reviewing the Home Loan applications and was thoroughly familiar with the architect sketches and full proposal of plan operation.

Q. Do you know why the buildings were limited to two stories in height?

A. Yes. The height requirement was because it was on a Base lease. The Fort Richardson original lease would not permit an extension of over two-story buildings.

(Testimony of Lela Hall.)

Q. With recreational areas provided in the arrangement of the buildings. That is part of the plan? A. Yes, they are.

Q. To what extent?

A. They were centralized and decentralized since the project [109] was developed to house families with children.

Q. And hence areas were provided in the acreage for recreation for the children?

A. That is correct.

Q. Lawns? A. Yes, sir.

Q. Was it the proximity to the runways of Elmendorf Air Force Base that influenced the height?

A. That is the reason. In the provisions of the lease we were not permitted to build above two stories for safety factors.

Q. Now, Mrs. Hall, did you have contact with the City officials with regard to the electrical installation, at first Panoramic View Corporation; second, Richardson Vista Corporation?

A. Well, in preparation for occupancy, there are many, many contacts on all phases of necessary utilities. During this time, shortly after arrival, I had a conference with Mr. Robert Sharp, then City Manager. I was preparing a budget analysis and I asked for estimates, so I discussed with him the proposed utility costs and at that time I was told that we would be treated as one establishment. I refreshed my recollection by going back through the minutes and notes that I had referred in the minutes of the corporation, the word "establishment" was used.

(Testimony of Lela Hall.)

Q. When was that conversation, to the best of your recollection?

A. It was in the early part of August. [110]

Q. Of what year? A. 1951.

Q. Did you have subsequent conversations with the City officials with regard to the matter of the electrical installations of the two projects?

A. Yes, we were in constant contact and on the first receipted billing which came through in September, we received individual billings for each building. I took these billings back down to Mr. Pendergras, who was then the City Treasurer, and Mr. Pendergras stated Mr. Sharp was out of town. I assumed that an error had been made. I asked him for a corrected billing. There were also arithmetical errors. He said I would have to wait for Mr. Sharp to return to town. In the meantime I talked to Mr. Mason Lazelle. Mr. Lazelle told me I would not be permitted to have a single billing because the National Electrical Code would not permit me to have single billings where I had individual meters. Then——

The Court: All this has been stipulated, hasn't it?

Mr. Hellenthal: I don't think so, your Honor.

The Court: Well, but it is admitted here. Upon what basis, or upon what theory, the City has made its charges and so all the efforts of the plaintiff to have some different system put into force, or method of billing, is just immaterial.

Mr. Hellenthal: Your Honor, we did not admit

(Testimony of Lela Hall.)

the basis on which the City computed their [111] charges.

The Court: Of course I understand that, but I just can't see how it would contribute here in any respect whatever to go into the details of the conversations or discussions and protests that were made in those days.

Mr. Hellenthal: I think, your Honor, that on the theory of the case, the second theory of the case that I enumerated in the opening statement yesterday that we can tie this up and show its pertinency and relevancy to the issues presented here.

The Court: I think you would have to show it now because for lack of time I would have to exclude it. I think you will have to show the pertinency now.

Mr. Hellenthal: Yes, sir. It is very simply: plaintiffs relied on the original interpretation of the City ordinances as furnished them by the City officials in their reports to their detriment. That is the theory for the testimony that we seek to offer.

The Court: I don't suppose the City is disputing what they relied on, is it?

Mr. Rader: It is hard for me to know what they relied on.

The Court: It is? You take the position that regardless of what they relied on, the City had a certain policy or method of billing in situations of this kind and merely adhered to that system or method?

Mr. Rader: That is our position.

(Testimony of Lela Hall.)

The Court: What the plaintiff relied on would appear to [112] be immaterial.

Mr. Hellenthal: What was that?

Mr. Rader: Pardon——

Mr. Hellenthal: What was their set policy that the City had? We are trying to show it. We tried to find out what it was.

Mr. Rader: Set policy is that we don't combine meter readings and we don't permit people to bill on a distribution system within the City of Anchorage.

Mr. Hellenthal: Of course we take issue with that. We were told otherwise.

The Court: But even if you were told otherwise, I can't see how it would be material here. For instance, you could call a City official here who was charged with the duty of determining these things or knew of them and ask him what the method or system of the City was at that time, or the basis for their billing practices, but I can't see how it would be of any assistance to the court to have all these preliminary matters—the efforts of the plaintiffs to one or another system invoked here or what was said at these discussions.

Mr. Rader: If it please the court, if you want to call a three-minute recess, I have an A.L.R. citation which goes to the section. There is no estoppel to the bill itself. Let's assume they represented to them and they bill on that basis. The issue is not whether or not we should have represented to them or whether or not we should have billed to them. If we offered them a [113] discriminatory rate, it

(Testimony of Lela Hall.)

would be illegal. We could cancel that contract today. The point is, there is no estoppel against the City in this respect because of an illegal contract. If you want to call a five-minute recess, I will produce the law on that.

The Court: Well, I'm inclined to take the doctrine of estoppel to apply to sovereign or political subdivisions.

Mr. Rader: That is *res gestae*. The question is whether or not it is discrimination and an estoppel and reliance.

Mr. Reischling: Without regard to estoppel here I don't believe the court is holding that a man cloaked with the authority that Mr. Sharp apparently was cloaked with and is cloaked with by statute and by the regulations of the City of Anchorage concerning the making of contracts for the service to consumers of electrical power and other utilities cannot be held to have bound the City. Now, I have submitted to your Honor authorities in which Supreme Courts of various other judiciaries have so held and if the court feels that without regard to the doctrine of estoppel that when a consumer and citizen of the city and a user of the service has no protection when he is dealing with the municipality merely because it is a municipality, then, of course, we have no case. If the court can in effect this morning rule, and I want to point out that no objection was made to this testimony, there was no objection of any kind at all, but if the court rules that we cannot show, and have no power to show the apparent authority with which Mr. Sharp was

(Testimony of Lela Hall.)

cloaked and his apparent authority to deal with representatives [114] of other consumers of power, then, of course, we cannot show any contract. But I submit, your Honor, that that is not the law.

Mr. Rader: If it please the court, let's assume that Mr. Sharp had told her they would give her power for nothing; they would give these plaintiffs power for nothing if they would build their factories here; build their housing project here, would that be binding on the City of Anchorage because Mr. Sharp did that? That would be the most illegal and unjust discrimination that anybody could have done. Anybody in Anchorage could come in and say, "You are discriminating against me because you are giving them free power." Now, the same principle applies when we give them a special—a preferential rate by combining meter readings. As I say, in five minutes I will submit authorities to your Honor, if you want to call a five-minute recess. I will submit a case which is to this effect that the city councils or city representatives for utilities company representatives have induced industries and establishments to be built in a certain location in a certain town and that thousands of dollars have been expended on that representation. If the court still holds that despite that representation, despite that contract, if the contract itself is discriminatory in favor of anyone more than one—a preferential rate in favor of one person, the Public Utility District Commission in the state can set it aside or the city council which has jurisdiction over regulations of utilities within its jurisdiction, within its limits, can

(Testimony of Lela Hall.)

also set it aside because it is an illegal contract. The whole [115] point is that if such a contract was made it is illegal unless there was a valid basis for it. Therefore, the agreements can have absolutely no bearing on the present lawsuit. Actually I don't think the testimony is going to hurt us very much if it does come out, but I think we will waste a lot of time. We are hasseling about who said what in the City.

The Court: That was the purpose of my raising the point as to the materiality of this evidence. Now, as I understand your position in stating your position as you did a few minutes ago, you base it, I suppose, on the difference between proprietary and governmental functions.

Mr. Reischling: Yes, your Honor, and further, your Honor, there is nothing in this case, but I agree with counsel with respect to giving away power.

The Court: Well, I suppose——

Mr. Reischling: This is not the same thing at all.

The Court: Suppose that counsel didn't go as far as he did in citing an illustration of that kind, which of course would be clearly beyond the apparent scope of any municipal office of authority, but suppose it was within the apparent scope of the officer's authority, then, is it your position the City is bound by that?

Mr. Reischling: If it is within the apparent scope of the man's authority, if the counsel has

(Testimony of Lela Hall.)

cloaked him with that apparent authority and a person relies on it as the plaintiffs did [116] in this particular case, having all the reason in the world to rely on it because he dealt with everyone else, and inasmuch as we are paying equal, if not greater rates, for power than anybody else, I believe that the contract was made, which the City has obtained the full benefits from and I think, and they did not live up to it. In fact, they have forced us, under the threat of turning off power, to pay them our own money without interest. In other words, it is almost like a bonus for getting power that other persons similarly situated to us did not have to pay, and that in the essence is the legal question. We can use verbiage and language to clothe this thing and have an obscured identity, but it boils down to one very simple problem, and that is, are we in the classification in which we are entitled to this particular rate and we look at the published rate of the City to determine that. And I submit to your Honor that there is nothing in that published rate which any consumer or customer could see that would lead him to believe that he could not rely upon his own agency. Is it the public—the City itself that makes that representation to him? Have we not the right to expect from our own City the type of integrity and the moral uprightness that we expect of our fellowmen. The people that are in that office, if we cannot rely upon what they tell us when we have their own published rate before us—that is what our problem is.

(Testimony of Lela Hall.)

The Court: Well, but you speak now of the question being one of classification. We will assume that that is so. How can [117] any discussion itself—preliminary discussion throw any light upon whether the classification is proper. As a matter of fact, when you speak of proper classification, then it assumes that any statement of the kind that has been referred to here, made by one of the City officers, would certainly not be binding if it didn't happen to be the proper classification. So, while I will agree with the proposition that the City is bound somewhat like a private litigant in certain matters, I am wondering whether the City would be bound in matters of fixing rates just because somebody in the City Hall had an idea that turned out to be incorrect.

Mr. Cottis: Your Honor, could I be heard briefly? I don't want to belabor the thing. It isn't a question of fixing rates or classifying. It's a question of the application of the published rate schedule and that schedule "C" that was in effect in 1951 provides for commercial electrical consumption in establishments not having more than single phase service, not having larger voltage motors than five horsepower and that sort of thing. What we are trying to show by this witness is that the City, along in the spring, said, "Yes, that schedule applies to you. You are one establishment. You will be billed for your house consumption as one establishment." And then a few months later, when the first bill

(Testimony of Lela Hall.)

comes through, it is no longer so. Now, we will connect up that testimony to show that if at the original conversation, the City had said, "No, you are not one establishment. You are 20 establishments or 19 establishments." Then, the consumer—the [118] plaintiffs here would have gone to the extent necessary to provide a single entry for its house current and the City, on being offered a single point of entry, would have had to bill them on one combined consumption schedule. Now, the plaintiffs rely to their detriment and to the benefit of the City apparently upon the promise that the rate would be applied in such and such a manner, and there is nothing—no tariff that indicates that it shouldn't or couldn't be applied that way. We have shown in stipulations this was a unique stipulation. It was the first housing project here. It was feeling its own way along and the National Electrical Code itself vests some discretion in the local body to interpret the thing. It doesn't require the City Council approval to interpret it any more than the building inspector has to go to the City Council to say, "No, you have got to put a vent in over in that corner or I won't let you go ahead with your building."

The Court: Now, will you just tell me what it is you would prove; for instance, that the plaintiffs were told by some representative of the City in these discussions and why it is material to the determination of any issue here. For instance, the argument sounds as though their actions were predicated on a breach of contract.

(Testimony of Lela Hall.)

Mr. Cottis: Mrs. Hall was told that she would get combined billing even though there were separate house meters in each building because, as a practical matter, it was good, feasible engineering to put a separate meter in each building rather than a [119] meter from one entry point because of the wide layout. She was told that. The plaintiffs relied on it and I think it is estoppel. Mr. Reischling thinks it is a contract. There is no doubt the City was in a proprietary capacity and I will take issue on Mr. Rader's law on the matter of estoppel.

The Court: Am I to understand this is a breach of contract rather than one of application of schedule?

Mr. Cottis: As outlined yesterday there are three cases on which to recover; one is, we fall clearly within the published rate schedule and haven't been treated accordingly, the second is, the City contracted or chose to deny its original interpretation of that rate schedule, and the third is, discriminatory practice against these plaintiffs by the City.

The Court: Well, since that appears to be the theory of the plaintiffs and since there is no jury here the Court, of course, has great latitude in admitting evidence even though he may feel certain that he will exclude it or give no consideration to it in arriving at a decision and if you make it brief, why, the evidence will be permitted.

Q. (By Mr. Hellenthal): Mrs. Hall, I believe I asked you the question, what, if any, reasons were given to you by the City officials following receipt

(Testimony of Lela Hall.)

of the billings as to why the billings were not combined?

A. The National Electrical Code was the first answer and the [120] second reference was made to Code 55. Now, in turn we offered to pay for the cost of the meters and offered to pay for the cost of an installation which would give us a single billing and we were told again that the National Electrical Code would not permit us to do it.

Q. When was the offer to furnish the capital required to secure the advantages of combined billing made to the City?

A. November and December of 1951.

Q. Was it made on one or more occasions?

A. Innumerable occasions.

Q. And it was made by you? A. Yes.

Q. Now, Mrs. Hall, you have testified that you did not receive billings for the project until, I believe you said, September, 1951?

A. We received—the first few billings came in in September and then rebillings came in in October.

The Court: You say rebillings?

A. Yes, they were incorrectly computed.

Q. What was the difference between the September original billings and the rebillings of October?

A. Mostly arithmetical and additional billings that were completed for occupancy.

Q. It was purely arithmetical errors?

A. Yes. [121]

Q. When were the project buildings occupied?

A. Initial occupancy in July of 1951 with final occupancy completed in December of 1951.

(Testimony of Lela Hall.)

Q. When? A. December of 1951.

Q. And that accounted probably for some of the errors in billing. Did those observations as to occupancy apply to both projects? A. Yes.

Q. Both Panoramic View establishment and Richardson Vista establishment? A. Yes.

Q. Now, Mrs. Hall, when you received—what formal action was taken upon receipt of the separate bills for each building that you described which occurred—and you correct me if I am wrong—in September, 1951?

A. A series of conferences were held with the representatives of the City.

Q. And were any letters written?

A. In November of 1951 we entered a formal protest.

Q. And did you sign that protest?

A. Yes, I did.

Q. I hand you, Mrs. Hall, Plaintiff's Exhibit 1 and will you tell me what it is?

A. It is a protest issued to the members of the City Council [122] and City Manager prior to the City Council meeting and requesting a hearing at the City Council meeting.

Q. Is that protest signed by you?

A. Yes, sir, it is.

Q. And was that protest delivered to the City officials? A. Yes, it was.

The Court: Hasn't that been admitted by stipulation?

Mr. Rader: Yes.

(Testimony of Lela Hall.)

The Court: Then there is no use of asking all those questions.

Q. (By Mr. Hellenthal): Was the protest read to the City Council? A. Yes, it was.

Q. It had been delivered some days prior to that?

A. Prior to the meeting. I don't remember the number of days.

Mr. Hellenthal: Your Honor, may I at this point—I will have difficulty and during the presentation of the case I may sometimes overlap on stipulated matters and I will appreciate it if counsel for the defendant will point out those things to me because I too have no desire to burden the Court, but I do ask for indulgence because it is quite easy to slip over some things.

Q. (By Mr. Hellenthal): Now, Mrs. Hall, you had conferences with Sharp and City officials prior to November? A. Oh, yes. [123]

Q. It wasn't too clear as to when. Could you again, at the risk of being reiterative, tell me the months during 1951 when those occurred?

A. I arrived in April and there wasn't a month that there wasn't a session of some type with the City in development of the new projects.

Q. And following the receipt of the first billings? A. There were a series of them then.

Q. During the month of October?

A. October and November both.

Q. To the best of your recollection who was pres-

(Testimony of Lela Hall.)

ent during the conversations you had with City officials?

A. Oh, goodness. I can enumerate several City officials also. Let's put it this way: Mr. Sharp, Mr. LaZelle, Mr. Pendergras, on occasions you accompanied me, Mr. Hellenthal, at times our Maintenance Supervisor accompanied me and on other occasions Mr. Arthur Cahn accompanied me.

Q. When you referred in your testimony to being billed as one establishment, what did you mean by that, Mrs. Hall?

A. Well, I was in the process of preparing preliminary budgets and during the discussions I went in to get the rate schedules and discussed our whole financial picture and at that time I was told, and Mr. Cahn was with me at the time, that we would be treated as one establishment and we got the rate schedule and discussed billing at the same time because we [124] understood there was also a deposit to be made and we wanted to prepare for the deposit.

Q. Now, in connection with the deposits did you put up a bond for those deposits?

A. Yes. We initially put up \$7,000 in cash and then later secured a bond. It was about three months before the bond was processed and we put up a surety bond and that was put up by the management agency originally then by the two corporations later.

Mr. Hellenthal: I have no further questions.

(Testimony of Lela Hall.)

Cross-Examination

By Mr. Rader:

Q. Mrs. Hall, when you came to the City in April of 1951 you say you reviewed the architect schedule and that type of thing?

A. I was managing 1300 apartments in Seattle. I was invited by the owners to come up in November and review—I went through the plans again in November. I had spent about a month going over the actual proposal and plans and some changes were made during the initial construction period to conform to a better management operation and I spent considerable time on the plans.

Q. When was that? [125]

A. My first trip to Anchorage was in November, 1940, and it was about the five months period prior to that.

Mr. Reischling: I think you mean November, 1950.

A. 1950, I am sorry. November of 1950.

Q. When was the first time you got in on any of this project?

A. In about five months before November so it would be about June.

Q. June, 1950? A. That is right.

Q. When did the construction start on the project?

A. I think Mr. Reischling should answer the dates on construction.

(Testimony of Lela Hall.)

Q. I am asking you the question; to the best of your knowledge?

A. About a year prior to that time.

Q. A year prior to that time? A. Yes.

Q. During June of 1949?

A. Ground breaking, I believe, was in February, 1949. Am I correct, Mr. Reischling?

Mr. Reischling: Ground was broken in August, 1949.

Q. August of 1949? A. Yes, sir.

Q. And the first time you got in on the project though was about a year later?

A. In November.

Q. Well, five months before November so it would be during the [126] summer of 1950?

A. That was the first time I went over the plans of the project, yes.

Q. And do you know if anyone else checked with the City of Anchorage concerning the rates and regulations, electrical?

A. If I should testify to it I would have to testify on a hearsay basis because I have been told by the members of the corporation and was instructed that there had been contacts and that everything had been arranged, but you would not accept my testimony because I can only testify as I actually made the contacts. Is that not correct?

Q. So it is your understanding other people in the corporation did contact the City relative to power rates, is that right?

(Testimony of Lela Hall.)

A. Certainly. Before an F.H.A. development can be constructed you have to have assurance of all your utility services and there are letters in the files guaranteeing utility services.

Q. You have those letters in your files, do you?

A. Sir, I am not employed by the corporations now.

Q. They are in the corporation files?

A. I do not know at this time. I have not been employed for some time by them.

Q. They were in the corporation files when you were with the corporation? A. Yes, sir. [127]

Q. Letters guaranteeing utility services?

A. Yes, sir.

Q. You have seen those?

A. Yes, sir. The signature was Mr. Don Wilson.

Q. To the best of your recollection what did those letters say?

A. Sir, I would not testify unless I had the opportunity to familiarize myself with letters I have not seen for four years.

Q. Do you have any recollection?

A. I would not testify without being able to look at the letters.

The Court: You should testify from recollection. It is only when you don't have any recollection that you are allowed——

A. The only thing I can say, sir, is that I know that the F.H.A. requirements were such and to meet those requirements in the actual loan applications there were letters guaranteeing service written by Mr. Wilson who was then City Manager.

(Testimony of Lela Hall.)

Q. Now, those letters would be dated about when?

A. During the loan application period.

Q. And when would that be?

A. Prior to construction.

Q. To the best of your knowledge when was that?
1948?

A. That I ask Mr. Reischling to confirm the proper date.

Q. I am asking you to the best of your knowledge?

Mr. Hellenthal: Your Honor, this seems kind of silly. The City wrote those letters and the copies are presumably with [128] the City and to ask this witness as to when they were written, when they were dated would be silly. Their own testimony would be better than anything else on the point. I think we are belaboring this thing too much.

The Court: Of course, by the same token you could say that the addressee had the letters also. But the fact he is asking her something of these letters that may also be evidenced by letters is not objectionable and without production of the letters—unless, of course, he would attempt to use the letters for impeachment, and, of course, he wouldn't do that. He wouldn't be allowed to because the rule states no one can be impeached by any writing except by showing the writing to the witness so that all these questions amount to are an attempt to elicit testimony from the witness of her recollection.

(Testimony of Lela Hall.)

Q. (By Mr. Rader): Getting back to those letters; it would be your recollection they probably would have been sent and received in 1948?

A. '48 or '49.

Q. Now, when you reviewed the architect plans, the architect schedule, did you have any occasion to know when your final commitment from F.H.A. was received?

A. I would have to refer back to the record to give you that.

Q. To the best of your recollection?

A. I think you should be asking the owner of the corporation rather than me. [129]

Mr. Hellenthal: You don't know, in other words?

A. I could hazard to guess, but it would be merely a guess.

The Court: You, of course, are not allowed to give testimony based on pure guess, but this is something that seems to me would not be pure guess. A witness is not required to testify to absurdity, only to his best knowledge and recollection, so when these questions are asked you should attempt to answer them to your best knowledge and recollection.

A. It would be approximately 1949.

Q. And now that would be when the F.H.A. approved your final plans for the project?

A. That is right.

Q. Before that time you can make changes in the plans?

A. You can negotiate changes during construction.

(Testimony of Lela Hall.)

Q. And afterwards, too?

A. Changes are in order.

Q. Do you recall whether or not those original letters, which you claim are in the corporation files, made any reference as to rates or meter readings or combined billing? A. I do not know.

Q. You don't recall that?

A. No, I do not know.

Mr. Rader: I would like at this time to ask the plaintiffs to produce those letters if such exist. I have no knowledge of them and I don't know whether they exist or not. [130]

The Court: The plaintiffs should produce them if they can.

Q. (By Mr. Rader): Were any changes made in the wiring schedule, the wiring drawings, subsequent to the final approval by F.H.A.?

A. I was in no position to know of any of the change orders. I do not know.

Q. For all you know the corporations may have planned from 1948 on, without any representation from the City, for the present wiring system they have, is that correct?

A. No, that is not correct.

Q. What do you know to the contrary?

A. I know from contacts with the inspectors with the City of Anchorage that we were required to conform on all occasions to the requirements.

The Court: When you say "conform to"—I don't know whether you said "to the requirements" or "to their requirements."

(Testimony of Lela Hall.)

A. The City of Anchorage approved, through the engineering agency, the plans of the development and they had to be built accordingly. The City of Anchorage had inspectors on the job at all times.

Q. Now, let's get this clear. You don't know whether the corporations ever submitted plans to the City of Anchorage for any wiring system other than the one that exists today, do you? [131]

A. I would not be in position of having made that request. That would have been done by the construction company.

Q. So you don't know?

A. I don't know what transpired.

Q. When you arrived in Anchorage on the spot in April, 1951, what was the condition then as to the construction of those buildings?

A. The buildings were not completed. The outside framing had been completed.

The Court: I think we will recess at this point. Recess for 10 minutes.

(Whereupon, at 11:15 o'clock a.m., following a 10-minute recess, Court reconvenes, and the following proceedings were had.)

Mr. Rader: If it please the Court, I would like to also ask counsel for the plaintiffs to produce the drawing showing the electrical system as approved by F.H.A., together with the date for the projects involved and also any changes in those which were approved by F.H.A.

Mr. Hellenthal: Your Honor, I should like to be

(Testimony of Lela Hall.)

heard on that. Under the ordinances of the City of Anchorage, which I need not go into here, the plans for all buildings, electrical, plumbing, heating installations, in the City of Anchorage must be approved by the City of Anchorage by its Building Electrical, and Plumbing Department before work can proceed. There must be [132] approvals posted on the job; approvals procured from the City in its capacity as inspecting official and governmental capacity. Before a nail can be driven or before a wire can be strung the plans must be stamped approved by the appropriate City of Anchorage department and filed with that department. And it would seem to me that if the City desires that evidence that it need only walk literally across the hall to its own building official where all plans and changes are on file and get them. We will certainly cooperate in every particular and if we thought they were material we would have gotten them through the City because the only appropriate plans are the plans that the City has in its own files. Those are the official plans.

The Court: This is cross-examination and he has a right to ask for this information. Objection overruled.

Mr. Hellenthal: Can he secure the information from us on cross-examination, secure the evidence?

The Court: I assume, of course, a demand for the production of some documents can be made at any time during the trial of a case and I assume he

(Testimony of Lela Hall.)

demands this to use for cross-examination or for rebuttal of this witness' testimony.

Mr. Hellenthal: All right. I just want my observation made so the Court will be aware of it.

Mr. Rader: If it please the Court, I think the Court should also have the further observation that I believe this was during the period Mr. Hellenthal was City attorney. I personally [133] don't know what the system was at that time as to the plans.

The Court: There is no use in arguing it. I have held that the demand was proper and should be complied with and that should end it.

Q. (By Mr. Rader): Now, I think you testified that the reason for the placement of the buildings as to density was F.H.A. requirements?

A. Yes.

Q. And the reason for the 2 stories was because of your lease?

A. We had a height provision. We could not exceed above a height provision.

Q. And I think you testified as to why that was?

A. The close proximity to the Base. It is actually Base land.

Q. You are guessing on that now, aren't you?

A. No, sir. The ground leased is Base land.

Q. You are saying that you know why they limited you to 2 stories, is that correct?

A. It is in the lease.

Q. Are you able to tell me why the military limited that lease to 2 stories, other than a guess?

A. The military requirements are that there be

(Testimony of Lela Hall.)

no structures above a specified height and that height has been a military requirement because of the hazard with the Base.

Q. Because of the hazard with the Base?

A. Hazard of flight, close to the Base. [134]

Q. You are guessing on that, aren't you?

A. No, sir, I am not.

Q. That is their reasoning?

A. That is correct, to the best of my knowledge.

Q. How much did the leases cost you?

Mr. Reischling: I object. That is immaterial and irrelevant. It has no bearing in this case.

The Court: I should think that would be wholly immaterial.

Mr. Rader: If it please the Court, I merely want to show they are creating the elusion they were forced by all these regulations. I want to show they had a good many advantages out of this situation. They voluntarily chose to build their buildings in a certain manner pursuant to the regulations, true, but there are some advantages to it. They are not the underdog all the way through on this thing. I think the lease price is one thing which will make the advantage obvious.

The Court: Suppose you could show that advantage, what would it tend to prove or disprove that is in issue here?

Mr. Rader: Well, what does it tend to prove or disprove? Well, the evidence is that it is governed by F.H.A. and they only have 2 stories——

(Testimony of Lela Hall.)

The Court: You didn't object to it when it went in.

Mr. Rader: Well—all right.

Q. (By Mr. Rader): Do you know what the condition of the wiring was in the [135] project the first time you talked to the City Manager?

A. To be more specific, do you mean, was it completed?

Q. Yes. A. No, it was not completed.

Q. The wiring?

A. No, it was not completed.

Q. When did you first talk to Mr. Sharp?

A. I met Mr. Sharp within 2 days after arrival in Anchorage, which was in the early part of April.

Q. I think you stated on direct examination the first time you talked to him was in August, 1951, about rates?

A. The actual speech about rates, that I can make a definite reference to, was in August, 1951.

Q. At that time some of the buildings were already occupied, weren't they?

A. The buildings were occupied.

Q. So the wiring was completed on those?

A. In August, yes, sir, on a portion of the buildings.

Q. And it was completed on a good many of the others, the wiring?

A. It depends on what part of the wiring you are referring to. The last installation was meters. The panels had been in prior to that time.

(Testimony of Lela Hall.)

Q. Did you have temporary power at that time or do you know?

A. There was a temporary hook-up during construction. [136]

Q. You say you talked to Mr. LaZelle, Mason LaZelle, City Electric Superintendent?

A. On many occasions.

Q. And did he represent to you that the National Electrical Code was the reason the City wouldn't permit this? A. Yes.

Q. That is what he represented to you?

A. Yes.

Q. When did he do that?

A. On one occasion, it was during the City Council meeting and on another occasion it was the day prior to the City Council meeting which there was a hearing.

Q. That would have been in November?

A. That is correct.

Q. Actually what did you ask the City to do; combine the meter readings and give you one rate? Is that what you asked them to do?

A. We asked for combined billing, you are correct, because under the interpretation of the ordinance as it was written we believed we were entitled to a single billing because all the buildings were identical and we had been treated as one customer or had been told we were being treated as one customer.

Q. Now, did you appear at the City Council meeting? A. Yes. [137]

(Testimony of Lela Hall.)

Q. With your counsel, Mr. Hellenthal?

A. Yes, sir.

Q. Did anyone else from the corporation appear?

A. Yes, Mr. Arthur Cahn.

Q. And at that time did you discuss these matters with the City Council and lay your case before them completely?

A. Yes, we had presented a letter specifying our request.

Q. And you also discussed and talked at that time?

A. Yes, sir.

Q. They just didn't read the letter but you discussed back and forth and asked questions, a little argument, that type of thing?

A. They decided first to table it then later decided to take action.

Q. But you did discuss it back and forth? They heard you, didn't they?

A. We appeared before the City Council.

Q. And you got to say whatever you wanted to say, didn't you?

A. As much—I don't think——

Q. Well, you are not going to cuss them out even though you feel like it, but you presented your case to them?

A. Naturally.

Q. And what was the case presented to them? The same thing you mentioned before that your meter readings should be combined? [138]

A. We had been told that we would be treated as one establishment and one customer and we had discussed with them that same approach and the

(Testimony of Lela Hall.)

only question that came up at that time was the City needed additional revenue. There was no discussion of the fairness. We were told that the electrical safety code would not permit us to have one meter reading.

Q. The only thing you requested of the City was to combine your meter readings and give you one meter reading, is that not true?

A. No, sir. In addition to that we offered the City any opportunity we could avail ourselves of, any changes we could make at our expense to get a combined billing rate.

Q. Did the City Council tell you at that time that they didn't combine meter readings for anyone else in town?

A. They said they would survey a number of what they thought might be like situations and there was to be a follow-up meeting to discuss it.

Q. Was there a follow-up meeting?

A. They also told us at that time there would be also a rate analysis. There had not been a change in the rates for approximately 8 years, it was represented to us at that time, and that there had been a rate study under way and there would be changes coming.

Q. Did the City Council—actually at that time they did not know or have knowledge that the practice of the City was not [139] to combine meter readings?

A. I don't—

Mr. Hellenthal: Your Honor, of course, she can't answer that.

(Testimony of Lela Hall.)

Q. You don't know what they told you, is that correct?

A. I can't testify whether the City does or doesn't have combined billing rates.

Q. I am not asking you that. I am asking you what the City Council told you or what was told you at that meeting?

A. Our request was denied at that meeting on the basis that the National Electrical Safety Code would not permit us to have a single meter reading.

Q. Did you ever in writing discuss the National Electrical Code, include it in any of your memorandums, any of your protests or anything else?

A. I would have to go back through the correspondence to check. I can't answer it without going back through it to actually check. To my present recollection I can't remember any.

Q. You can't remember any? A. No, sir.

Q. In the protest you filed with the City all you wanted was combined billing?

A. We asked for combined billing and asked for any method we might arrive at a combined billing rate.

Q. Do you have any correspondence from the City prior to the [140] summer of 1954 or do you know of any correspondence between either one of the plaintiffs and the City prior to the summer of 1954 which discussed the National Electrical Code or even mentioned it?

A. I am sorry, I do not know.

Q. What is your recollection?

(Testimony of Lela Hall.)

Mr. Hellenthal: She said she didn't know.

The Court: She can testify from recollection.

Q. Do you have any recollection?

A. No, I do not.

Q. You mentioned everything else in your correspondence though, didn't you?

A. Well——

Q. Well, every other phase of this thing, didn't you, just about?

A. We tried to include everything we could.

Q. You tried to include everything you could; everything that was at issue and every argument disputed?

Mr. Reischling: I submit, if the Court please, the letters would be the best evidence and the City has them if there was correspondence between this witness and the City.

The Court: It would be if he was trying to prove something substantively, but for correspondence the best evidence rule doesn't apply.

Q. Now, it is your testimony that Mason LaZelle turned you down on the basis of the National Electrical Code? [141]

A. Interviews were held with Mason LaZelle, who is the Electrical Superintendent, I believe that is his correct title, and he also testified at the City Council meeting that the National Electrical Safety Code would not permit us. Reference was also made to Code 55 of the City of Anchorage.

Q. When did you offer to pay for the meters and installation?

(Testimony of Lela Hall.)

A. In November and December of 1951.

Q. Do you have any correspondence which says anything of that nature?

A. There were conferences held at which there were minutes taken.

Q. Do you have those minutes?

A. I would have to check and see if they are available. I do not know.

Mr. Rader: I would like to make a notice to produce on that also of the minutes of conferences showing there was discussions of the National Electrical Code at that time or near that time.

The Court: The plaintiffs will produce them.

Mr. Rader: Also that they offered at that time to pay for the meters and their own installation and their own distribution system.

Mr. Cottis: Your Honor, before the plaintiffs are required to produce them I think that Mr. Rader should show whether the City took the minutes or whether the plaintiffs did.

Mr. Hellenthal: Who took the minutes? [142]

Q. (By Mr. Rader): Who took the minutes?

A. I am sorry, I am not sure.

Q. How do you know minutes were taken?

A. Just that during the discussions we had some joint minutes we discussed back and forth. I don't know whether it happened to be Mr. Sharp's secretary or if it happened to be mine. We met a number of times and discussed it.

Q. Now, you don't know about the minutes or whether you have them, is that correct?

(Testimony of Lela Hall.)

A. I don't know whether they are there. I have not been in Anchorage for——

Q. You don't even know if they were actually taken, do you?

A. There were minutes taken which I have so stated. Whether they are still in existence I cannot guarantee.

Q. Well, you don't know whether they were taken by Mr. Sharp or by yourself, under your direction or his?

A. Both of us took notes by one secretary and on occasions where those specific items were discussed I don't know which one of us used our secretary. We alternated at different times, depending on where the meetings were held, depending on whether it was in his office or in mine.

Q. You don't know whether you instructed your secretary to take notes or not?

A. If it was in my office my secretary took notes; if it was [143] in his office his secretary took notes.

Q. Did you have meetings in your office?

A. Both places.

Q. You made minutes for the ones in your office?

A. I have no way of knowing—I have been gone for some time—whether those are still in existence or not. You see, the companies have been sold and I have no way of knowing whether they are still in existence or not.

Q. But when you left the companies they were in existence?

(Testimony of Lela Hall.)

A. I have a firm recollection that there were minutes, but to tell you where they are at this time I cannot.

Q. When you left the company there were minutes, is that correct?

A. To the best of my knowledge.

Q. And which would be minutes kept by your secretary?

A. Or Mr. Sharp's secretary, depending upon where the meeting was held.

Q. Well, there would be some from your secretary?

A. That is right. There is one which I made a specific reference to the National Electrical Safety Code and I am not sure which session that came up without looking back and being able to check.

Mr. Rader: As long as we understand our notice to produce, I am asking the plaintiffs to produce any minutes or correspondence relative to their offer to put in their meters and own distribution system prior to the summer of 1954, if such [144] exists.

The Court: The plaintiffs are ordered to comply with that demand.

Q. Do you know anything about a contract between the City of Anchorage and the plaintiff corporations concerning an easement for a substation site located on your property?

A. I did not execute that contract. I am familiar that there is one in existence.

(Testimony of Lela Hall.)

Q. Have you ever seen the contract?

A. No, just that I know that certain lands were liad out and construction was referred to, but the maintenance supervisor is the one that actually handled the coordinating of the location.

Mr. Hellenthal: Your Honor, in an interest to expedite this I know this wasn't covered on the direct.

The Court: Beg your pardon.

Mr. Hellenthal: I know this wasn't covered on the direct examination.

The Court: Will you read that question?

(Whereupon, the reporter read question line 9 and answer line 10 above.)

The Court: I don't see how that could be within the scope of the direct examination.

Mr. Rader: Well, if it please the Court, she was manager here during that time and she has testified she had full [145] and complete and thorough understanding and knowledge of it and I wondered if she knew about this and was familiar with the terms of it. That was the reason I asked it.

The Court: Well, you mean it is for the purpose of testing her recollection. Is that it?

Mr. Rader: Yes.

The Court: Well, I am just wondering whether you mean her recollection as to the construction of this project or something else.

Mr. Rader: Her recollection actually as to the fact they did give a permit to the City to put up a

(Testimony of Lela Hall.)

substation and there were some clauses in that agreement which might be of interest as to whether she is familiar with it generally. Apparently if she is not we will forget about it.

The Court: Usually you test recollection not by bringing entirely extraneous matters into the case, but by referring to something within the scope of the direct examination. In other words, when a person testifies to one subject and has a good recollection concerning most of it and no recollection concerning some part of it, why, you may predicate an argument on that. That goes to the credibility of the witness. But when you pick on something outside the scope of the direct examination, something entirely extraneous, that wouldn't necessarily be a test of credibility or test of recollection. [146]

Q. (By Mr. Rader): Did you ever have occasion to discuss with these people and did they ever tell you the common practice by the City of Anchorage was to combine meter readings?

Mr. Hellenthal: Your Honor, I object to any questions, either on cross or direct, dealing with policies of the defendant. This matter is purely a matter of promulgated rates pursuant to clear ordinances and any testimony as to hidden, unpublished policies——

The Court: It just goes to part of the discussions, so the objection will have to be overruled. This is not reaching into some other field or anything of that sort. This is for the purpose of cross-examining her as to what was said in these discussions.

(Testimony of Lela Hall.)

Mr. Hellenthal: I still want to register my objection to any matters dealing with policies.

The Court: Objection overruled.

Mr. Rader: I am sorry, did Your Honor sustain the objection?

The Court: No, I overruled it.

Q. (By Mr. Rader): Did you have any understanding as to the policies of the City of Anchorage concerning combined meter readings?

A. I answered you, I think first and let me again repeat it this way, that my early conferences with Mr. Sharp indicated that we would be treated as one consumer with one billing. [147]

Q. Did you subsequently have occasion to inquire around, become acquainted——

A. It was only after receipt of the billing and there was a question at that time as to whether it was properly done or not and they waited for Mr. Sharp's return from out of town to establish whether it had been properly done.

Q. Let me ask you this: Do you know of any other instances in the City of Anchorage or ever hear of any other instances where there is combined meter readings?

Mr. Hellenthal: Your Honor, that is beyond the scope of the direct examination.

The Court: I think it would have to be her knowledge with reference to such matters. It would have to be in order to be relevant here, before or at the time of these discussions with the City because otherwise it would be immaterial. If she knew

(Testimony of Lela Hall.)

of this in her discussions with the City presumably it would be something that would affect the discussions, what was said there, but otherwise if it was knowledge she acquired later it would be immaterial.

Mr. Rader: Wouldn't it be material, Your Honor, if we did have a policy and although she was perhaps ignorant of it for several months after her first billing in September or April when she came up here, wouldn't the fact that we had a policy and she found out in September of that policy——

The Court: Wouldn't it be material as to what? [148]

Mr. Rader: To establishing the policy and the fact there has been no departure from it.

The Court: You don't mean to tell me you are going to rely on this witness to establish a policy of the City of Anchorage?

Mr. Rader: I don't have any doubt she will testify to just exactly what the facts are and the fact is that it is the policy.

The Court: Well, as I have said before I think that would be a proper subject of inquiry if it were shown that she had discussions with matters of rates after she learned of it.

Mr. Reischling: If the Court please, may I add this—does a policy—does it become a substitute for an ordinance in this case? Are we trying the case on an ordinance and on published rate schedules or

(Testimony of Lela Hall.)

something that is subject to change without notice?

The Court: I don't think that is the purpose of it or that that would be the test of determine whether this is admissible. It is a matter that since the question of good faith of the City has been raised here, whether it bears on the question of good faith, but, as I say, I don't see how it could have a bearing on good faith or anything else unless after having learned of this policy she had further negotiations with the City. [149]

Q. (By Mr. Rader): When did you learn of the policy; at the council meeting?

Mr. Reischling: I object. She has never testified she learned of any policy. The question is a double barreled question. She hasn't testified she learned of it.

The Court: He assumes a fact not yet in evidence, that is true, so——

Q. (By Mr. Rader): You did find out that was the policy?

A. All I had to go on was the published rate schedule and we followed the published rate schedule and felt we were living within the provisions of the published rate schedule.

Q. You talked to other people about this?

Mr. Reischling: That is argumentative. I object to that.

The Court: Objection overruled.

Q. Didn't you?

A. I discussed it with City officials, City councilmen following the billing and there was a great deal of difference of opinion.

(Testimony of Lela Hall.)

Q. Was it your understanding you didn't understand it was the policy of the City not to combine meter readings? Is that your testimony?

A. I was assured by Mr. Sharp that we would be treated as one customer and I still feel that that was his commitment made.

Q. I am not asking you—— [150]

Mr. Reischling: Let her finish her answer.

Q. Are you through? A. Yes.

Q. I am asking you when you found out the policy was—or what the policy was with the City in regards to combined meter readings?

Mr. Reischling: I object. That is assuming a fact not in evidence.

The Court: Do you contend that that fact is in evidence; the fact that she knew of the policy?

Q. All right. Did you ever find out it was the policy of the City not to combine meter readings?

A. All I can go back to is what the rate schedule says and the only answers I ever got to my questions was that the National Electrical Code would not permit us to have a single reading.

Q. Is it your testimony Mr. LaZelle, Mr. Sharp and City councilmen didn't say something to you like this, "We don't combine meter readings. We don't have one situation in the City where we give a person a lower rate." Did anyone say anything like that to you?

Mr. Reischling: I object. She did not testify to that. He is assuming something not in evidence. She

(Testimony of Lela Hall.)

has not testified to that. Counsel is testifying so maybe he should be sworn.

The Court: There isn't anything in this last question that assumes any facts not in evidence. He is asking her if she [151] ever learned of this and the fact that he omitted something by way of argument doesn't affect the propriety of the question.

Q. Did you ever learn of that?

A. Not in those words.

Q. All right, you tell me the words you learned them in?

A. We were asked during the discussion, what we had asked following the discussion, what we could do to have a single billing rate because we felt that we were entitled to it on the basis of our plan, our layout, the type of customer we were. The ordinance provided—the rate schedule provided that we were eligible for it and it was during that discussion.

Q. What did they say?

A. At no point have we actually received any correspondence which says, "You are not eligible to a single billing rate."

Q. I am not asking you that. I am asking you about the policy you started telling me about; how you got it and when you found out about the policy? What did they tell you the policy was?

A. I cannot quote the City policy.

Q. I am asking you to tell me in substance what it was?

Mr. Reischling: I am still objecting. It is not in evidence. She hasn't testified she learned——

(Testimony of Lela Hall.)

The Court: He is asking her when she learned of this policy that has been under discussion for 15 minutes. There can't be any misunderstanding about it. Objection overruled. [152]

Q. (By Mr. Rader): Now, would you please answer the question?

A. The only answer I can give you is when I first received billings on individual buildings was the first I had any awareness there was not a meeting of the minds that there would be single billings.

Q. When did you—or did you testify you finally found out the policy was not to combine meter readings?

A. I haven't testified to any policy because I am not in a position to quote the City policy. I only say to you I refused these bills and there was even a question then of whether it was properly billed or not.

Q. Let's go through this once again slowly. Did you go to the City council then and City officials and talk to them?

A. Yes, sir. I appeared at a City council meeting.

Q. And did any City official or did the City council represent to you that the policy of the City was not to combine meter readings?

A. We were told we would receive an individual billing. I do not remember a specific statement of the policy by any member of the City council.

Q. I am asking you what you were told at this time, not what you were told before?

(Testimony of Lela Hall.)

A. At that meeting and the answer was that the City needed the revenue, and, therefore, we would be billed on the basis of [153] individual meters.

Q. Mrs. Hall, you have had occasion to discuss this billing procedure with a lot of people, haven't you?

A. It depends upon when you are referring to.

Q. Around town here?

A. I haven't been around town for a year.

Q. You were here for 3 years though, weren't you?

A. That is correct.

Q. During that time did you discuss it with anyone else?

A. I have discussed billing with a number of persons. My experience in previous billing had been a combined billing where I operated 1300 units. We had a combined billing which was customary practice.

Q. I didn't ask you that. I asked you if you discussed it with anyone around here. Please answer my question, if you can?

A. Of course, one discusses billing.

Q. You discussed it with apartment house owners, did you?

A. I am aware of the practice of some of the other apartment house owners.

Q. Did you discuss it? A. Yes.

Q. Who else did you discuss it with?

A. It would be difficult to name the number of people that I discussed it with.

(Testimony of Lela Hall.)

Q. You discussed it generally around here, didn't you? [154]

Mr. Reischling: If the court please, may I ask for the record that counsel establish what period of time he is discussing or talking about. Now, is it this week or last week or a year ago?

The Court: Well, he referred when he began this line of questioning to the period she was in Anchorage. Objection overruled.

Q. You have discussed it with a good many people? A. Surely.

Q. Did you ever discuss with them combined meter readings?

A. I am aware of the readings in certain buildings, yes.

Q. Do you know of any place where they combine them?

A. I know that the plans were completed so that a single billing would be made to certain buildings and I know other buildings that made alterations in their plans in order to get a single billing.

Mr. Hellenthal: Could you read that please.

(Thereupon, the Reporter read the last answer above.)

Q. (By Mr. Rader): In other words, people would change the wiring in their premises so that they would have one service drop and one meter. That is what you are talking about, isn't it?

A. Right.

Q. Let me ask you if you know of any apartment houses served by the City of Anchorage which are

(Testimony of Lela Hall.)

separate houses and [155] under one ownership where the City combines meter readings as you have asked to have done?

A. I don't know that anyone else has a comparable situation in the City of Anchorage, however, you have buildings where you have a group of apartments that are under a single roof that have a combined billing.

Q. Yes, we just bill you once for each single building.

A. But no one else that I know of has a comparable situation where they by requirements had to establish more than one building.

Q. You are talking about the 1200 "L" Apartments, for instance, which may be 8 stories high?

A. Uh-huh.

Q. And contain a hundred or so apartments or maybe two hundred. I don't know.

A. Uh-huh

Q. Is that what you are talking about?

A. That is right.

Q. They cover maybe a quarter of a block, one building? A. That is right.

Q. They have one meter and one billing, is that right, for their house lights?

A. As far as I know.

Q. Are you familiar with the E & E Apartments?

A. Yes, sir. [156]

Q. Would you describe those to me, please?

A. The E & E has 3 buildings with 96 units and they are individually metered. They are also included in our request for adjustment as a separate

(Testimony of Lela Hall.)

site development in which the owner should have the right of combined billing of the 3 buildings

Q. E & E is like Panoramic View and Richardson Vista in that situation?

A. That is correct.

Q. What is the practice of the City of Anchorage with regard to them?

A. All of our payments for E & E have been made under protest in identically the same manner as payments were made for Pan. and Rich.

Q. Are you also the agent for E & E?

A. I was agent for E & E.

Q. Are they the same owner of these apartments?

A. Which period of time and which specific project are you referring to? There is a difference in ownership.

The Court: I think we will recess at this time. I wonder if it would be inconvenient to anybody concerned here if we reconvened at 1:30?

Mr. Hellenthal: Excellent.

Mr. Rader: Fine.

The Court: Recess to 1:30. [157]

(Whereupon, at 11:50 o'clock a.m., the court continues the cause to 1:30 o'clock p.m.)

(At 1:30 o'clock p.m., counsel for plaintiffs and counsel for the defendant being present, the trial of said cause was resumed:)

The Court: The witness will resume the stand.

Q. (By Mr. Rader): Mrs. Hall, do you know

(Testimony of Lela Hall.)

whether or not there was any changes in the drawings and the engineering for electricity and service of electricity of that project, or either of the projects during the time in 1951 when you were in Alaska? A. I do not know.

Q. I am a little bit confused. If this is repetitious you will excuse me, but did you ever find out that the policy of the City of Anchorage was not to combine meter readings?

A. I think I answered that and the only way I can answer is that I am not familiar with the statement whether it is or is not a policy.

The Court: But that isn't the question. The question is did you ever learn of the policy?

A. No, sir.

Q. (By Mr. Rader): You never learned of that policy? A. No, sir. [158]

Q. You have never been present when that was claimed?

A. I do not know of an actual policy.

Q. I am handing you Exhibit K and directing your attention to the last paragraph on page 2 and the top paragraph of page 3.

A. What is the Exhibit? Exhibit K?

Q. It is the notes of the council meeting of November 9, 1951, and ask you if the minutes when they say as follows: "It was determined that the request, if granted, would alter the established policy of billing electric energy for each individual building and thereby also affect many others who own more than one building in the community and are

(Testimony of Lela Hall.)

being billed on a separate unit basis." Do you recall anything of that nature?

A. I have never seen these minutes and the discussion was primarily one of whether it should be granted and not being one of whether it was fair to grant a combined billing, but the loss of income to the City was the main discussion.

Q. Well, I am asking you to refresh your recollection of that meeting, in which you were in attendance, by reading those notes and ask you if those official records to the best of recollection are incorrect or correct?

A. I ask to hear the tape recording which was taken at the time because I do not remember this wording.

Q. I am not asking you about the wording, Mrs. Hall. I am asking you about the policy and what was said there in substance? [159]

Mr. Reischling: If the court please, may I ask if counsel contends that the minutes are the complete proceedings that took place at that council meeting?

Mr. Rader: No, I don't contend any such thing.

Mr. Reischling: Obviously if this is not the complete record or transcript it is improper for counsel to attempt to have this witness testify to the complete transaction when merely a part of it has been transcribed.

The Court: I don't see anything improper in it for cross-examination. Objection overruled.

Q. Now, I am asking you again if the matters

(Testimony of Lela Hall.)

reflected in the minutes there as to policy were in fact stated at the meeting?

A. I remember no policy actually being determined. I mean, the only way I can answer you is, as I remember it was primarily a discussion of whether the City could afford the difference between a combined billing or individual billing. There wasn't a discussion. We were told out and out that the National Electrical Code would not permit us and that was testimony given at the City council meeting by Mason LaZelle. We were not told it was City policy other than they were following the National Electrical Safety Code, so that I have no knowledge of a policy or regulation other than the rate regulation that is in your telephone book.

Q. Mrs. Hall, I am merely asking you if what is reflected in those minutes, in that particular paragraph that I read to you, [160] is true or false to the best of your recollection?

A. I can't answer you because this is someone's interpretation of what went on. My interpretation I have tried to give you in detail.

Q. In your interpretation is that true or false? Can you say?

A. It says, "It was determined that the request, if granted, would alter the established policy of billing electric energy—" I was not aware of the policy so how can I answer you?

Q. Was there any discussion to that effect?

A. I remember no discussion of a policy. I have answered you that I remember and definitely

(Testimony of Lela Hall.)

can point out the conversation that went on between Mason LaZelle and other City council members in which he quoted the basis; not that there was a policy of the City of Anchorage because it hadn't been presented as far as I knew up to that point.

Q. To the best of your recollection would you say that those records are false?

A. I have no way of answering whether they are false or correct.

Q. You can't say? A. No, sir, I can't.

Q. That is fine. Is it your testimony that Mason LaZelle stated to you that the National Electrical Code prohibited combined meter readings?

A. Would not permit a single meter for the projects.

Q. Would not permit a single meter for the projects? [161] A. That is right.

Q. Now, that is different than combining the readings?

A. But his answer to us on a request of adjustment was that the National Electrical Code would not permit the installation of a single meter and he answered to us that they were working under, I believe it is Ordinance 55, isn't it? Am I right? I don't remember.

Q. I didn't ask you about Ordinance 55. I am asking you about the National Electrical Code. Your own counsel will ask you about these other things. You just answer my questions.

(Testimony of Lela Hall.)

Mr. Reischling: I object to the attitude of counsel. He asked her about a conversation and her answer was proper for the question that he asked her.

The Court: Well, she volunteered the statement about Code 55 and he merely pointed out to her that he was not asking about Code 55.

Q. Now, you state that he said that the National Electrical Code would not permit one meter for the whole project? A. That is right.

Q. Now, what did he say as to why you should not have 33 meters and combine the readings?

A. He gave me the same answer.

Q. That wouldn't change the wiring, would it, from what exists?

Mr. Reischling: I object. That is argumentative.

Mr. Rader: I am going to make sure we understand each [162] other.

The Court: Yes, I think in view of the testimony given by the witness on those matters that this is not exactly argumentative.

Q. (By Mr. Rader): Would you go ahead and answer me, please?

A. Would you repeat your question, please?

Q. Merely leaving the meters as they presently exist today and as they have existed throughout the period of time in discussion, the fact you would sit in your office and combine those readings and apply a different reading has nothing to do with the

(Testimony of Lela Hall.)

National Electrical Code, does it?

A. Your wiring would make the difference.

Q. The wiring is left just like it is.

A. That is why we asked for the rate.

Q. We wouldn't have to change it at all?

A. That is why we asked for the rate.

Q. Why did they tell you they would not combine the meter readings?

A. We were told they would combine them to begin with.

Q. Why did they tell you later on they would not combine meter readings?

A. Because there would be a loss of revenue to the City.

Q. It didn't have anything to do with the National Electrical Code, that part, did it? [163]

A. That was the reason we were not given permission to tie in and use one billing.

Q. Well, the reason that they did not combine meter readings had nothing to do with the National Electrical Code, did it?

A. We asked for an application of rates and they told us it could not be used because of it.

Q. Maybe we don't understand each other, Mrs. Hall. Assume for a moment that the wiring as it is up there complies with the National electrical Code——

A. That is a fair subject. It had to.

Q. It does? A. That is right.

Q. It is a fact. Now, you don't have to change

(Testimony of Lela Hall.)

any wiring or anything else to add up the meter readings and give a different rate, do you?

A. No.

Q. That has nothing to do with the National Electrical Code——

Mr. Hellenthal: I didn't hear your answer, Mrs. Hall. No, was it? I saw your lips move but I couldn't hear anything.

A. No. Actually we were led to believe that because of the National Electrical Code we could not be considered and that was Mr. LaZelle's interpretation of it.

Q. Do you mean to tell me that Mr. LaZelle said and represented to you that even though the wiring is exactly as it is and would not be changed one bit by combined meter reading that [164] the National Electrical Code did not permit that? Is that your testimony?

A. May I add the other part to that? I mean, he included at the same time Ordinance 55 or Code 55 and the National Electrical Code and those are the two things that I have answered each time.

Q. I am trying to break this down.

A. I don't know which part of it—I can only answer those with the two things which were told and the reason we couldn't do it.

Q. Is it your testimony that he said that the National Electrical Code had anything to do with

(Testimony of Lela Hall.)

combined billing, adding up the meter readings and applying a certain rate? Is it your testimony that he argued that that had something to do with it?

A. I have told you each time that it was a combination of the two reasons that they gave us that we could not do it.

Q. As a matter of fact he said, "We are not going to combine your meter readings because it is not the policy of the City. We have never done it and we are not going to."

A. No. It wasn't a question of policy; it was a question of income. We were told there would be a rate revision in the near future. It had been 8 years since there was a rate revision.

Mr. Rader: I would like to ask counsel if they have been [165] able to produce any letters or if they have attempted to produce any letters, correspondence or minutes showing any mention of the National Electrical Code prior to the summer of 1954?

Mr. Hellenthal: No, we have not other than the—I doubt if we will be able to other than the conversations that have been testified to and will be testified to by other witnesses.

Mr. Reischling: On behalf of Panoramic View I asked Mr. Sarno to check through the file to see if anything had been left there that counsel had asked for and we have nothing in our files in respect to these particular matters that he asked for.

(Testimony of Lela Hall.)

The Court: Are you speaking now of one or all of the things that he asked for?

Mr. Reischling: We have nothing in Panoramic View, Your Honor, other than what we have produced here in court. I think we have brought in a couple of maps on the wiring, but that is all we have. We have no correspondence other than has been produced here in court.

Mr. Hellenthal: My understanding of the question was limited to correspondence. The map then is another matter

Mr. Rader: You have the electrical drawings?

Mr. Hellenthal: Well, we just served a subpoena on the City Manager and City Clerk to produce the approved electrical drawings from the City Electrical Department and they probably will have them shortly.

Mr. Rader: If it please the court, may I at this time [166] serve a subpoena on them to produce the same thing. Now, your Honor ruled this morning that I had a right to do that under order, to produce. Suddenly they come around with a subpoena and say, "No, you are going to produce it."

Mr. Hellenthal: I didn't probably amplify my answer sufficiently. We also have a great number of electrical drawings and maps that we shall produce.

Mr. Rader: Are they available at the moment?

Mr. Hellenthal: I have some here and some

(Testimony of Lela Hall.)

will be coming in a few minutes. Now, whether they are complete or not I don't know, but we will find out very shortly. People are gathering them up at this moment, others are in Seattle and as the Court knows we did not anticipate this request on behalf of the defendant because the approved plans are on file with the City and when my clients asked me as to what plans they should bring I said, "Well, you can bring whatever you can lay your hands on readily, but you need not worry about it because the plans are by law required to be on file with the City and we can use those."

The Court: Of course, the only question that presents itself to the court upon a demand of that kind is who would be presumed to have them. Now, it seems to me that since the plaintiffs here found fault with this arrangement of billing from the very beginning that it would be presumed that they would be in better position to supply these documents than the City which has not only like documents from probably thousands of other places, but [167] also from the plaintiffs and so it seems to me that the ones who should logically produce the documents are the plaintiffs.

Mr. Hellenthal: I can give Mr. Rader the documents I have now. I think this is all he wants. I have here the plot plan and utility layout.

Mr. Rader: If it please the court, if he will give me the opportunity to examine these we need not discuss them.

(Testimony of Lela Hall.)

Mr. Hellenthal: Let me just list them. I have here Panoramic View as built plot plan and survey made by Hewitt V. Lounsbury, Registered Engineer.

The Court: What is the use of dictating that to the reporter since the defendant may not want to use any of them?

Mr. Hellenthal: Well, here it is and here is the other one for the other project.

The Court: It is my understanding you want to examine those during the recess or do you wish to examine them now?

Mr. Hellenthal: Then I have here Electrical Plan 22-unit building, prepared by E. C. Fields, Registered Engineer, which is the plan for every building.

Mr. Rader: Is that all you have?

Mr. Hellenthal: Other than what the City will undoubtedly furnish us and there may be some more coming.

Mr. Rader: These plats relate to electrical wiring. They are electrical wiring plans?

Mr. Hellenthal: Not all of them. There are some [168] overlapping. Now, if you want me to identify these, your Honor, I can answer the question.

Mr. Rader: Never mind, we can look at them. If it please the court, could I ask for a 10-minute recess to examine these?

The Court: Yes, if you think it will take that long.

(Testimony of Lela Hall.)

Mr. Rader: Well, there are about 15 pages——

The Court: Well, you may notify the bailiff. We will recess subject to call and you may notify the bailiff.

(Whereupon, at 2:02 o'clock p.m., following a 10-minute recess, court reconvenes, and the following proceedings were had.)

Mr. Hellenthal: I have also produced, your Honor, the as-built plans for the entire project and the specifications, a pamphlet of some 60 or 70 pages.

Mr. Rader: I would like to continue with this witness.

The Court: Very well.

Q. (By Mr. Rader): Mrs. Hall, you say you are familiar with the E & E apartments?

A. Yes, sir.

Q. They are 2-story apartment buildings, are they, with a basement? A. That is correct.

Q. Very similar to the ones up on the hill, Panoramic and Richardson?

A. It depends on what you are referring to, the similarity. [169]

Q. How many units are there in each building?

A. Let's see. There are 3 buildings totaling 96.

Mr. Hellenthal: May I object as beyond the scope of the direct examination?

The Court: No, it is not beyond the scope of the direct examination. Objection overruled.

(Testimony of Lela Hall.)

A. 32 units to a building.

Q. How far apart are the buildings?

A. Oh, about 30, 40 feet.

Q. Each of those buildings has a separate house meter? A. Yes, sir.

Q. And a separate meter for each of the tenants?

A. Yes, sir.

Q. That is just exactly like Panoramic View and Richardson Vista? A. That is correct.

Q. And the 3 billings for those house meters are considered separate and individual in the same manner as you are being treated?

A. Those bills were paid under protest just the same as the other developments. You asked me if they were being paid the same?

Q. Are they being billed the same way to you?

A. Yes.

Q. And they are being paid under protest?

A. Yes.

Q. Now I am asking you about Jefferson Court Apartments. Are [170] you familiar with those?

A. Yes.

Q. Will you describe those buildings to us?

A. They are two buildings, Jefferson Courts, totaling 84 units. 84 units in the total project with 2 buildings.

Q. How far apart are those buildings?

A. It is u-shaped so that actually the ends of the two buildings are probably 40 feet apart. There is a center court.

(Testimony of Lela Hall.)

Q. Are there any public streets through that project?

A. There is no public street through Jefferson Courts.

Q. There is no public street through E & E either—I mean, between the buildings? A. No.

Q. Now, Jefferson Courts, is the metering done the same way there in those apartment buildings as it is with Panoramic View and Richardson Vista?

A. Yes.

Q. And the bills are not combined? A. No.

Q. I mean, are not consolidated.

A. All the bills come to us on one bill but they are separately metered.

Q. In other words, all the kilowatt hours aren't added together to give you one rate?

A. No, sir. [171]

Mr. Hellenthal: No, sir; was that the answer?

A. That is right.

Q. They are not added together?

A. That is right.

Q. They are precisely the same way as with Richardson Vista and Panoramic View?

A. Yes, sir.

Q. Now, the S & S Apartments. Are you familiar with those? A. Yes.

Q. How many buildings does that have?

A. I think it is 230 units with 9 buildings.

Q. 9 buildings?

A. I believe that is correct.

Q. 230 units? A. Yes.

(Testimony of Lela Hall.)

Q. Are they individually metered for the tenants? A. Yes.

Q. The billing is just exactly like it is for Richardson Vista and Panoramic View?

A. As far as metering is concerned, yes.

Q. Metering and billing also.

The Court: I am just wondering why the parties couldn't agree that these other projects are handled——

Mr. Hellenthal: Your Honor, I have difficulty in hearing.

The Court: I say, I don't see why the parties can't agree [172] that all these apartment house projects are, so far as billing is concerned, handled in the same way. Why do we have to adduce testimony on that point?

Mr. Rader: Well, what about Linda Arms?

Mr. Hellenthal: What about it?

Mr. Rader: Do you agree it is handled the same way as Panoramic View and Richardson Vista?

Mr. Hellenthal: In regard to what?

Mr. Rader: Well, can you think of any difference? Let's put it like that.

The Court: As far as billing for electric current is concerned.

Mr. Hellenthal: No, I believe that I can stipulate as Mrs. Hall testified that at least during recent years a bill was submitted.

Mr. Rader: I think it would be quicker to get it from the witness, your Honor.

Mr. Hellenthal: Frankly, I do too.

(Testimony of Lela Hall.)

Mr. Reischling: I don't know anything about Linda and Hollywood, but I will stipulate that—if the witness testifies that Hollywood and Linda and the rest of them are billed in exactly the same way as Panoramic View is billed that is all right with me.

The Court: Your stipulation depends on the testimony.

Mr. Reischling: I don't know anything about Linda. I [173] have no interest in those places and know nothing about them.

Mr. Hellenthal: I can make a stipulation, but I doubt if I can do it on my feet here, but I am certainly willing to stipulate about the facts of the billing to all the projects.

The Court: That they are billed the same way.

Mr. Hellenthal: There has been a change during the time covered in this lawsuit and for—well, we will take as an illustration Panoramic View, up until 1954 it was billed through Anchorage Rental Service.

The Court: I don't mean as to the formality of billing. I mean as to the billing for consumption.

Mr. Hellenthal: In recent years the total consumption of the project has been put on one billing and the meter reading of each meter on the same billing and down at the bottom is a total amount charged. Am I not correct?

A. That is right.

Mr. Hellenthal: And I will so stipulate. We can put a typical billing in evidence if you would care to. We have them here.

(Testimony of Lela Hall.)

The Court: I don't think it is necessary to encumber the record. If you can agree it would be unnecessary to elicit the information from the witness.

Mr. Cottis: Your Honor, is it clear to your Honor that these matters that Mr. Rader is going into are groups of buildings that were erected long after the plaintiffs here and that if [174] Mr. Rader is trying to establish policy he is not establishing policy at the time Mrs. Hall's direct testimony was related to, but at a subsequent time.

The Court: No, that isn't clear to me. I assumed that he was examining the witness for the purpose of showing that at the time she was having these discussions with the City officials that she knew that the arrangement, so far as billing is concerned, was the same for all these other places.

Mr. Hellenthal: They weren't even built.

Mr. Rader: I don't know when they were built. When was E & E Apartments built?

Mr. Hellenthal: Your Honor, now I object to this as going beyond the scope of the direct. This is part of the plaintiff's case and I don't think it can be proved on cross-examination.

The Court: Well, of course, the question is not so much now whether it is a part of the defendant's case * * * it could be said that it is a part of the defendant's case, but if it is proper cross-examination then the fact that it is incidental would tend to prove his case doesn't make it improper cross-examination. That is the only question before the

(Testimony of Lela Hall.)

court, whether it is improper cross-examination and it would seem to me that unless these other apartments were constructed about the same time or not very long afterwards so that the witness here could be chargeable with knowledge of the method of billing or would be presumed to know that the method of billing these other places that were essentially the [175] same so far as construction of layout is concerned, why, it would, of course, affect or tend to affect her credibility perhaps and for that reason it would be a proper subject of inquiry. But if they were built so far subsequently that they couldn't have influenced her in her discussions with the representatives of the City it would certainly not be within the scope of the direct examination.

Mr. Rader: If it please the court, I don't know when these buildings were built, but assuming they were all built afterwards—they may have been, I don't know—she testified on direct examination that they were being discriminated against and the City wasn't treating them like they were the other owners, apartment owners in the City.

The Court: Well, if that is the testimony the objection will be overruled. I didn't recall it.

Mr. Rader: It goes to the complete time of the lawsuit.

The Court: Objection overruled.

Q. (By Mr. Rader): When were the E & E Apartments constructed, do you know?

Mr. Reischling: Just for the record that was not

(Testimony of Lela Hall.)

the testimony of Mrs. Lela Hall and the record will bear me out. She could not possibly have discussed other places that were not even yet in existence and weren't in existence until more than a year after.

The Court: It isn't whether she mentioned these other [176] buildings by name; it is whether she by general or other testimony intimated that the plaintiffs were being discriminated against. Now, if she has testified in such tenor then it would be proper to examine her in this fashion for the purpose of attempting to affect her credibility on that point.

Mr. Rader: It is my recollection she so testified. I could be in error.

Q. (By Mr. Rader): Could you tell us when the E & E Apartments were constructed?

A. The responsibility of the buildings came over to me on completion of occupancy, and occupancy of the E & E Apartments, if I remember correctly, was in December of '53. I could check files and check it for sure.

Q. How about the Jefferson Courts?

A. Jefferson Court was prior to E & E. Jefferson Court occupancy was about, I would say a year prior, 6 months to a year. The first initial occupancy was Richardson Vista then a portion of Panoramic View then Jefferson Court then——

Q. So Jefferson Court was being occupied at the same time as Panoramic View and Richardson Vista?

A. No, we completed occupancy before construc-

(Testimony of Lela Hall.)

tion—it was in December, I believe. It was some time later.

Q. December of what year, 1951?

A. No, it wouldn't be '51.

Q. Are you able to recall? [177]

A. December was initial occupancy and I believe it would be '52.

Q. How about Hollywood Vista?

A. Hollywood Vista was the last of the completed units and didn't come in until '53.

Q. They were not occupied until '53?

A. No.

Q. And S & S Apartments?

A. S & S was concurrent with E & E.

Q. Linda Arms? A. After S & S.

Q. How much after? A. 2 or 3 months.

Q. When would that be?

A. Well, let's see. You see, we would get one building and then another building. What you want is the completed dates of occupancy?

Q. I would like to know the initial dates of occupancy, when you started receiving bills from the City of Anchorage?

A. May I make a telephone call and get it for the record as long as you want specific dates?

Mr. Hellenthal: Just say you don't know.

Q. You can supply the dates?

A. Yes, they are all on file.

Q. Now, Linda Arms I believe you stated was similar to the other projects we have been [178] discussing? A. Yes.

(Testimony of Lela Hall.)

Q. And it is treated precisely as Panoramic View and Richardson Vista? A. Yes.

Q. That is, so far as billing is concerned?

A. Yes.

Q. Do you know of any other similar housing projects in the City of Anchorage?

A. I do not.

Q. That is served by the City of Anchorage?

A. I do not.

Q. Are you familiar with the Alaska Housing Project out on "I" Street?

A. That is not similar. That is a low-rent development and is a governmental agency.

Q. Are you familiar with the billing on that?

A. No, I am not.

Q. Do you know of any apartment buildings where the buildings are separated and where the City of Anchorage combines meter readings where they have separate meters?

A. I can't reply as to what the City of Anchorage does on other billings.

Q. I am asking you if you know of any?

A. I don't know of any.

Q. On these utility deposits which you gave the City of Anchorage, [179] do you know how those were computed?

A. You mean the amount of deposit determined?

Q. Yes.

A. The amount was determined by the City council.

(Testimony of Lela Hall.)

Q. Well, to determine the amount of your utility deposit—let me ask you this: How much was it, did you say?

A. The initial payment was \$7,000.00 in cash.

Q. For what?

A. For utility deposit for the management agency representing Richardson Vista and Panoramic View.

Q. For both projects? A. Right.

Q. Do you know how that \$7,000.00 was computed?

A. Well, I think you should tell me how it is computed.

Q. I am asking you if you know?

A. It was an estimate of twice the monthly billing.

Q. That was computed on the basis of each building as it was cut in?

A. No, not that. It was just estimated that our monthly billings would be \$3,500.00 per development and it was twice that for the two developments.

Q. For the total combined billing for the two projects would be \$3,500.00?

A. They established twice that.

Q. That is all you know about it? [180]

A. Do you have another question you want to ask?

Q. Do you know anything else about it?

A. I don't know what you are referring to.

(Testimony of Lela Hall.)

Q. The way it was computed?

A. I only know we were directed to present that amount of money.

Q. How about when you had partial occupancy?

A. What do you mean?

Q. Well, when you had one building occupied what was your utility deposit then?

A. The first request for utility deposits came in while we were completing initial occupancy on the two developments and the lag period between the deposit and the time that was completed wouldn't have been more than a month and a half, the major portion.

Q. I see.

Mr. Rader: I believe that is all.

Redirect Examination

By Mr. Hellenthal:

Q. Mrs. Hall, were you not directed by the City to furnish the \$7,000.00 utility deposit?

A. Yes, sir.

Q. When you said you were directed you meant you were directed [181] by the City Clerk-Treasurer, not by any of your principals?

A. No, it was the City Clerk-Treasurer that requested it, and named the amount.

Q. Now, I hand you, Mrs. Hall, Plaintiff's Exhibit No. 3. Will you please look at this exhibit, which is a City of Anchorage Topographic Map

(Testimony of Lela Hall.)

prepared for them by the Ryall Engineering Company and will you please take my fountain pen and draw a circle as to where the E & E project, that you were asked about on cross-examination, is located?

A. Here is Ship Creek and it is just up the street from Ship Creek.

Q. Do you see the 3 buildings on the map?

A. Yes, there are 3 buildings in one location.

Q. Then will you put a little circle around those 3 buildings?

(Witness so designated on the map.)

Then draw a line out to the white portion of the map and put down "E & E, Inc."

(Witness so designated on the map.)

Mr. Rader: I don't see any need for this witness to do that. I am not going to argue about the location. If counsel wants to draw them in we can stipulate to the location.

Mr. Hellenthal: Fine. We can do that later on the map.

The Court: I think his suggestion contemplates it being done outside of court hours.

Mr. Hellenthal: Yes, and we can then use it for exhibit purposes. [182]

Mr. Rader: There has never been any argument on the location.

Mr. Hellenthal: I think this is the quickest way of doing it.

(Testimony of Lela Hall.)

Q. (By Mr. Hellenthal): Up until 1954 you, as the managing agent of the Anchorage Rental Service, managed the apartment projects known as Panoramic View, Richardson Vista, Hollywood, E & E, Linda Arms, S & S, and Jefferson Courts, did you not? A. That is correct.

Q. Were the affairs of these corporations with the exception of Panoramic View corporation managed by a common board of directors?

A. Yes.

Q. Up until 1954? A. Yes.

Q. Were the stockholders identical, or do you know? A. In the major portion, yes.

Q. They were identical? A. Yes.

Q. In other words, they were owned in common by a group of investors? A. Right.

Q. Now, Mrs. Hall, I believe that you testified about minutes or notes being taken of conversations that you had with the [183] City Manager. When you referred to minutes in your testimony what did you mean?

A. As I tried to explain, it was the practice—my assistant manager often went with me and it was a question of taking notes for a check list on a work list, actually is what we did and it was a common practice.

Q. And I believe you testified that to the best of your recollection Mr. Sharp, the City Manager, may have taken notes either directly himself or through his secretary at these same meetings?

A. That is correct.

(Testimony of Lela Hall.)

Q. Now, as far as any notes that you or your assistant manager may have taken where would they be now?

A. I have no idea that they might even be in existence or not because they were actually work check lists.

Q. Do you customarily save those?

A. Not as a practice, no.

Q. Now, you used the word "Code 55" in response to some questions on cross-examination. Did you use the word "Code 55" interchangeably with the word "Ordinance 55" of the City of Anchorage or what did you mean by Code 55?

A. I think I probably was referring to the ordinance rather than code.

Q. Were you aware of any policy of the City of Anchorage that might or might not have been in existence in 1951 at the time [184] Richardson Vista project and Panoramic View project were occupied that might be contrary to the published tariffs of the City of Anchorage relating to rates for electrical service?

A. No, I knew of no policy.

Q. At the sake of possibly having touched on this earlier, were the apartment buildings in Panoramic View project and Richardson Vista project uniform?

A. Yes.

Q. Were the apartments within the apartment buildings uniform?

A. Yes.

Q. Would the apartments in Building 19 of Richardson Vista or Panoramic View be comparable—

A. 19 is Richardson Vista.

(Testimony of Lela Hall.)

Q. —19 of Richardson Vista be comparable to, say, Buildings 1 or 2 or 3 of Panoramic View?

A. Buildings 20, 21 and 22 of Panoramic View is identical or comparable to the buildings.

Q. In other words, the apartment units in these 14 plus 19 buildings were identical?

A. That is correct.

Q. And they were rented by their respective corporations to tenants? A. That is correct.

Q. Now, of course, priority, pursuant to your lease with the [185] Interior Department, was given in Panoramic View to Interior Department employees, is that not correct?

A. The only difference between Richardson Vista and Panoramic View is the priority schedule set up.

The Court: Now is that going to be material here, who was given priority?

Mr. Hellenthal: It may not be. That was the only question I asked on that.

Q. Rentals were fixed by F.H.A. for both projects? A. That is correct.

Q. At all times from '51 up until '54?

A. Yes.

Q. Tenant rentals? A. That is correct.

Mr. Hellenthal: I have nothing further.

Recross-Examination

By Mr. Rader:

Q. Mrs. Hall, you state that—first let me ask you, aren't each of these apartment units, E & E, Jefferson Courts, Linda Arms, S & S, Alaska Housing, Panoramic View and Richardson Vista owned by private corporations?

(Testimony of Lela Hall.)

A. You tossed in Alaska Housing Corporation and—— [186]

Q. I am talking about ownership of the projects.

A. I had better answer you this way: That I terminated with the beginning of the taking over the Alaska Housing Corporation and they should answer their financial structure.

Q. I think you testified, did you, that they were all managed by a common board of directors?

A. I testified in relationship to 1951, initial occupancy until the sale. The Alaska Housing Corporation is a separate corporation.

Q. Let's forget about Alaska Housing. Let's talk about the rest of them. They are all owned by——

A. They are individual corporations.

Q. Individual corporations?

A. That is correct.

Q. In other words, there is E & E Corporation, Jefferson Court Corporation, and Hollywood Vista Corporation? A. That is correct.

Q. They have always been that way?

A. That is correct.

Q. As far as you know?

A. That is correct.

Q. Although they had all interlocking directors or common board of directors, as you put it——

A. The same individuals have an interest in all of those developments. [187]

Mr. Rader: That is all.

(Testimony of Lela Hall.)

Mr. Reischling: May I ask a question? Do you mean to say that the directors, all of the directors of Panoramic View had an interest in Hollywood?

A. No, he did not mention Panoramic View. He said all of them had interlocking directors, and correct me if I am wrong, E & E, S & S, Linda, Hollywood, but you did not mention Panoramic View in that group.

Q. (By Mr. Rader): How about Panoramic View? A. Panoramic View is different.

Q. It has been different all along? A. No.

Q. It was different at one time or it is different now?

A. It is different now and it has been different over a period of time.

Q. You mean it hasn't had the same stockholders and board of directors? A. No, sir.

Q. Were they ever the same? A. No.

Mr. Rader: That is all.

Mr. Hellenthal: That will be all, Mrs. Hall. You may step down now.

(Thereupon, the witness was excused and left the stand.) [188]

Mr. Hellenthal: Mr. Herman Sarno.

HERMAN B. SARNO

called as a witness for and on behalf of the plaintiffs and, being first duly sworn, testifies as follows on

Direct Examination

By Mr. Cottis:

Q. Would you state your name?

A. Herman B. Sarno, S-a-r-n-o.

Q. Where do you reside?

A. Long Beach, Long Island.

Q. You are up here in connection with this litigation?

A. Well, among other things.

Q. Can you give us some idea of your occupation, Mr. Sarno?

A. I am an attorney.

Q. And are you also in the housing and hotel business?

A. Yes, I am the president of the Alaska Housing Corporation and of the E & E, S & S, Linda Arms, Jefferson and Hollywood and Richardson corporations mentioned here today.

Q. When did you acquire your interest in these various corporations?

A. As of March 1, 1954.

Q. Mr. Sarno, did you receive last July, that is, July of 1954, a letter from Mr. McKinley, the City Electrical Superintendent?

A. I don't believe I ever received a letter from him. I [189] received from him a copy of a letter that he wrote.

Q. Where is the original of that letter? Do you know?

(Testimony of Herman B. Sarno.)

A. Well, the original was sent to the National Fire Protection Association which is, as I understand, a subsidiary of the National Board of Fire Underwriters.

Q. I am speaking of a letter addressed to the Alaska Housing Corporation.

A. That was in October.

Q. Correct. Now, do you have the original of that October letter addressed to the Alaska Housing Corporation?

A. No, I do not. I have a copy that was made by our office here in Anchorage. The original I mislaid in my office.

Q. In New York? A. Yes.

Q. Do you have the copy with you?

A. Yes, I do.

Q. Was that made in the normal course of business by your Anchorage Office?

A. Yes. This letter actually was addressed to the Alaska Housing Corporation and sent to 1308 Hollywood Drive, Attention, Mr. Harlan, our general manager in Anchorage. Mr. Harlan, as his custom, made and retained a copy for his office and sent me the original.

Q. May I have the copy, Mr. Sarno?

Mr. Cottis: I offer it in evidence. [190]

Mr. Rader: No objection.

Q. Before you received that letter, Mr. Sarno, had you had any discussions at Anchorage with Mr. McKinley, the Electrical Superintendent for the City of Anchorage, with respect to their method of billing various apartment projects?

(Testimony of Herman B. Sarno.)

A. Yes, I have had a discussion with the City Manager, with the City council, with Mr. Rader and with Mr. McKinley and I will say that the discussions have all been very amicable in the spirit of the greatest co-operation.

Q. In any of those discussions has the National Electrical Code been mentioned? A. Yes.

Q. Will you relate that discussion as nearly as you can remember it?

A. With the court's permission I would like to give a little history of this, if I may, and I will stop when directed.

Mr. Cottis: Certainly.

The Court: Well, only that much of the history should be given as is necessary to understand what he will testify to.

Q. Will you give us the background of these discussions?

A. When we acquired these properties there were several pieces of litigation involving these companies and the City of Anchorage. In a meeting with the City council I evinced my interest in disposing of all litigation, asserting that we did not like to be suing anybody especially the City of which [191] we were doing business and after a long discussion was had with the City council, as a result of which I was referred to Mr. McKinley and Mr. Rader. I said at the City council meeting that night that in this particular litigation that is pending now we had not commenced it and did not desire it to be continued if it could be adjusted on an

(Testimony of Herman B. Sarno.)

amicable basis and get these rates straightened out. I said that I had read the briefs prepared by your office and had an independent analysis made of the law as we interpreted it and we thought the City was clearly in the wrong from all the information we had, but we were, nevertheless, not insistent.

Mr. Rader: If it please the court, it is an interesting story, but I don't think it is material—what he has said so far.

Mr. Cottis: This is the discussion, if your Honor please.

A. I initiated the conversation between myself and Mr. McKinley. As a result of this conversation with the City council I was referred to Mr. McKinley.

The Court: I can't tell whether this is material and relevant until he tells it all. Nobody has made any statement of what is going to be proved by this witness or to what these questions are directed so I am unable to pass on it. I just assume that it is not going to be irrelevant and immaterial, [192] otherwise, I don't think you are doing your job right.

Mr. Cottis: I don't expect it to be irrelevant, your Honor.

A. May I continue then, your Honor?

The Court: Yes.

A. I said to the City council that I thought that the plaintiff in this action was so clearly right that I could not understand why the litigation was permitted to continue and that I was not interested in

(Testimony of Herman B. Sarno.)

obtaining a large money judgment against the City of Anchorage and would have no keen pleasure in collecting it; that I would like the litigation settled expeditiously and fairly and get these rates adjusted on a fair and decent basis; that we were operating in many cities in the United States, projects of this kind, where uniformly we had combined billing for units of this type and that a vast majority of stateside housing of this garden type character was always permitted combined billing.

Q. What was Mr. McKinley's reply?

A. That was before I spoke to Mr. McKinley. This was at the meeting of the City council and the City council thought my position was fair and I offered to give to the City attorney all of the legal memoranda and all the factual matter we had for their examination and for them to decide—they would have our case in advance—and if they felt that we were right about it we would proceed further and if they felt we were [193] wrong nobody would be harmed and at least they would know everything of what we thought about in our theory in the matter. They welcomed that. They asked us to give that memoranda to Mr. Rader, so I did. Thereafter, Mr. Rader caused a meeting to be held between he and Mr. McKinley and I. Mr. McKinley seemed to want to be co-operative and to get us a lower rate schedule and it was apparent to me that the injustice of having to consider each building as a separate customen when all owned by one corporation, the absurdity was apparent, and they

(Testimony of Herman B. Sarno.)

wanted to straighten out the situation. Mr. McKinley was very much concerned that this could not be done because it would violate the Underwriters Code. He pointed to a section which he said would cause great difficulty in getting the thing straightened out. Mr. Rader and I did not agree that his interpretation of what the meaning of the word in the Underwriters Code meant and accordingly it was agreed that Mr. McKinley would write a letter to the Underwriters to ask whether there was any prohibition in a certain line of rewiring contemplated and he so wrote the letter and sent me a copy and he got an answer.

Q. Did he send you a copy of the answer?

A. No, I have never gotten a copy of the answer.

Q. The letter of July 19 from the City of Anchorage, Mr. Sarno, that they were good enough to send you a copy of, was it written to the National Board of Fire Underwriters?

A. My letter says, "National Fire Protection Association," which I [194] understand is a subsidiary of the National Board of Fire Underwriters.

Q. And that letter was written with the approval of both the defendant, City of Anchorage, and the plaintiff, Richardson Vista Corporation?

A. Well, I guess that is substantially correct. I did not see the letter before it was sent. It was agreed that such a letter of the general character of this should be sent.

Mr. Cottis: Your Honor, yesterday at the pre-trial conference the letter from the City to the

(Testimony of Herman B. Sarno.)

National Fire Protection Association, which is the compiler of the National Electrical Code, and their reply to that letter, were reflected as being admissible. I should like to reoffer them on the basis of Mr. Sarno's testimony that the letter was initially written at the request of both parties and the reply to that letter was never made available to Mr. Sarno.

The Court: Well, I have the same doubts about the admissibility that I had then. All it represents, as I see it, is an effort on the part of Mr. McKinley to find support or precedent in his position. Now, the fact that he failed to obtain precedent or support does not make it admissible.

Mr. Cottis: It was in the nature, your Honor, of an agreement between the two parties on this dispute to say, well, let's write to the National Electrical——

The Court: There isn't anything here to show that there [195] was an agreement to abide by the reply to that letter.

Mr. Cottis: I grant that, but inferentially that could be drawn.

The Court: I think it amounts to no more than a failure on the part of the City to find support for its position.

Mr. Hellenthal: It is proof, your Honor, that the City has, as late as '54, persisted in its position that the National Electrical Code——

The Court: Suppose he did and suppose it was mistaken, that doesn't——

(Testimony of Herman B. Sarno.)

wanted to straighten out the situation. Mr. McKinley was very much concerned that this could not be done because it would violate the Underwriters Code. He pointed to a section which he said would cause great difficulty in getting the thing straightened out. Mr. Rader and I did not agree that his interpretation of what the meaning of the word in the Underwriters Code meant and accordingly it was agreed that Mr. McKinley would write a letter to the Underwriters to ask whether there was any prohibition in a certain line of rewiring contemplated and he so wrote the letter and sent me a copy and he got an answer.

Q. Did he send you a copy of the answer?

A. No, I have never gotten a copy of the answer.

Q. The letter of July 19 from the City of Anchorage, Mr. Sarno, that they were good enough to send you a copy of, was it written to the National Board of Fire Underwriters?

A. My letter says, "National Fire Protection Association," which I [194] understand is a subsidiary of the National Board of Fire Underwriters.

Q. And that letter was written with the approval of both the defendant, City of Anchorage, and the plaintiff, Richardson Vista Corporation?

A. Well, I guess that is substantially correct. I did not see the letter before it was sent. It was agreed that such a letter of the general character of this should be sent.

Mr. Cottis: Your Honor, yesterday at the pre-trial conference the letter from the City to the

(Testimony of Herman B. Sarno.)

National Fire Protection Association, which is the compiler of the National Electrical Code, and their reply to that letter, were reflected as being admissible. I should like to reoffer them on the basis of Mr. Sarno's testimony that the letter was initially written at the request of both parties and the reply to that letter was never made available to Mr. Sarno.

The Court: Well, I have the same doubts about the admissibility that I had then. All it represents, as I see it, is an effort on the part of Mr. McKinley to find support or precedent in his position. Now, the fact that he failed to obtain precedent or support does not make it admissible.

Mr. Cottis: It was in the nature, your Honor, of an agreement between the two parties on this dispute to say, well, let's write to the National Electrical——

The Court: There isn't anything here to show that there [195] was an agreement to abide by the reply to that letter.

Mr. Cottis: I grant that, but inferentially that could be drawn.

The Court: I think it amounts to no more than a failure on the part of the City to find support for its position.

Mr. Hellenthal: It is proof, your Honor, that the City has, as late as '54, persisted in its position that the National Electrical Code——

The Court: Suppose he did and suppose it was mistaken, that doesn't——

(Testimony of Herman B. Sarno.)

Mr. Hellenthal: We must prove that. It has been conceded here.

The Court: But I have held and I hold now it is immaterial. The fact that somebody finds no support for his position doesn't mean that his position is wrong or that he has to abandon it.

Mr. Reischling: It is inconsistent with the position taken by the City in the trial of this case. It was the practice or policy of this city.

The Court: This might tend to rebut that if they have said it. I don't know. They haven't introduced any evidence. If they do, it might become admissible in rebuttal.

Mr. Reischling: It is my understanding it was an attempt to show it wasn't the policy. I objected this morning to which the court overruled the objection and permitted it to go ahead. Now I say that the theory used in the courtroom today and [196] late yesterday is inconsistent with the theory which they had expressed to the representatives of both plaintiff corporations which this particular exhibit will tend to establish and to confirm.

The Court: I don't see anything inconsistent between the policy that the City had and the fact that it didn't find support for its policy somewhere else.

Mr. Rader: If it please the court, we admit what Mr. Sarno testifies to here as to the conversation about the National Electrical Code. We are not contesting that. That is the first time it ever came up to our knowledge.

(Testimony of Herman B. Sarno.)

The Court: The ruling made yesterday is adhered to.

Mr. Cottis: I am sorry, I didn't hear.

The Court: I say, the ruling made yesterday is adhered to. It is immaterial.

Mr. Cottis: Even to show it is offered, not for its contents, but to show this new theory of the City that they had a policy right along against combined billing?

The Court: How could it possibly do that? As I pointed out a minute ago, the existence of a policy on the part of the City could not be negated by something that somebody else disagreed with.

Mr. Cottis: Your Honor, I realize you have not read these exhibits, but I would like at this time to read a portion of [197] Plaintiff's Exhibit 4 which is a letter from the City of Anchorage Superintendent of its Electrical Department, dated October 11.

The Court: Is this the letter to which reference has just been made?

Mr. Cottis: No, this is one which has been admitted. The letter, I may state, goes into this situation and is completely silent on being contrary to the City's policy and it ends up with these two paragraphs, "If the proposal of combination billing were pursued under the new rate structure the following estimated billing would indicate the cost of December, 1953, power"—and then it gives the dollars and cents figures—"therefore, it is our advice

(Testimony of Herman B. Sarno.)

to leave the circuits as they now exist and take full advantage of the new rates." My point is, your Honor, that the City, through our witness, Mrs. Hall, has tried to leave some innuendo that they had had a policy right along against combined billing. Now, we have two documents, two admissions by the City, one of last October which has been admitted and the other one of last July which we are trying to get admitted, which negative their claim because in neither of those letters did they say a thing about it being contrary to their policy. They say in one letter, "It is better for you financially to leave it alone," and in the other one they say, "It is against the National Electrical Code."

The Court: May I see that letter?

Mr. Cottis: I wonder if the court could examine the [198] one they are offering in evidence that has been rejected.

The Court: Well, I think that has been sufficiently described so I need not examine it. I don't think I recall your argument now as to this particular exhibit. Will you repeat it?

Mr. Cottis: You mean when this exhibit was admitted?

The Court: Well, whatever you said a moment ago about this exhibit.

Mr. Cottis: This exhibit of only a few months ago goes into the subject and doesn't say a word about combined billing being contrary to the City's long established policy. Now, Mr. Rader, through this exhibit, which is the minutes of the council

(Testimony of Herman B. Sarno.)

meeting, and through his cross-examination of Lela Hall, has tried to leave forth some evidence that the City has had an established practice and policy against combined billing. The exhibit that your Honor has before you and the one that we would like to get in both relate intimately to this very problem and neither of them say a word about it being against the established practice of the City or against the policy of the City. We don't offer them for the truth of their contents, or at least the July letter we don't offer it as expert opinion evidence on whether the code does or doesn't apply, we offer it simply to say that as recently as July, 1954, the City hadn't dreamed up this policy they are now relying on. At that time they were still relying on the National Electrical Code. Possibly it will be better in rebuttal but because of the admission of exhibits during [199] the pre-trial conference and particularly because of the admission of the City council minutes, which does refer to an established practice on the part of the City, I thought it would expedite matters to rebut those minutes and rebut what Mr. Rader tried to elicit from Mrs. Hall with respect to some fictitious policy by producing these July letters of last summer.

The Court: It is incompetent for the purpose. It will be excluded.

Mr. Reischling: May it please the court, I know that ordinarily it is unnecessary to accept a matter of this kind because of the rule, but where the document that has been offered has not been marked for

(Testimony of Herman B. Sarno.)

identification and the record, therefore, cannot show to what the ruling referred I now ask the court to permit that rejected document to be marked for identification and that the Clerk will show that the document was offered and refused so that I may except to the ruling of the court.

The Court: You may have it so marked.

Mr. Reischling: Thank you, your Honor.

The Court: We will recess now for 10 minutes.

(Whereupon, at 3:10 o'clock p.m., following a 10-minute recess, court reconvenes, and the following proceedings were had.)

Mr. Hellenthal: Your Honor, the City has examined Plaintiff's Exhibit No. 3, which has been marked to show the location of various housing projects, and they are in agreement [200] that the exhibit as marked is a true portrayal of the location. We have in court, your Honor, the Electrical Superintendent of the City of Anchorage and he has produced all of the approved electrical plans for Panoramic View and Richardson Vista in response to our subpoena and we will leave them on the table here for inspection by the City.

Mr. Rader: I want to know if there is any more that you are going to claim or that you know of?

Mr. Hellenthal: The construction company might have some, but we know of no more.

Mr. Rader: All right.

Mr. Hellenthal: We have no further questions of Mr. Sarno.

(Testimony of Herman B. Sarno.)

Cross-Examination

By Mr. Rader:

Q. Mr. Sarno, I believe you mentioned that you owned quite a number of projects in the states?

A. That is correct.

Q. Apartment houses? A. Yes, sir.

Q. Different buildings on the same plot of ground?

A. Yes, a number of multi-story and garden type—various types. [201]

Q. Do you have any of the same type as Panoramic View or Richardson Vista? A. Yes.

Q. Where are those located?

A. McGill Village, Pulaski, Virginia.

Q. Pulaski, Virginia. How many buildings does that have? A. That has 75.

Q. How many apartments in each building?

A. Two.

Q. Duplexes? A. Well, they are one story.

Q. Just two apartments in each building?

A. Yes.

Q. Do you have a house meter on each one of those?

A. Well, we don't pay for the electricity on those meters because the tenants pay their own electricity.

Q. There is no house meters on those then?

A. No, but we have the house meter for our own office building and we have a number of street lights, very substantial number of street lights and we buy

(Testimony of Herman B. Sarno.)

that electricity from the power company there and that is metered as one unit.

Q. Your street lights? A. Yes.

Q. Now, Mr. Sarno, I want to ask you again if you have any projects which are similar to Panoramic View and Richardson Vista [202] in the states?

A. Well, we don't have any that have as many units in each building as Panoramic View or Richardson Vista.

Q. Tell me the ones you have that are closest to it.

A. Kenwood Garden in Toledo, Ohio, they are 7-family buildings.

Q. Toledo, Ohio? A. Yes.

Q. 7-family dwellings? A. Yes.

Q. Do you have a utility room in each of those buildings? A. Yes.

Q. How many buildings are there? A. 72.

Q. One-story buildings? A. Two.

Q. Do the tenants pay for their own electricity?

A. Yes, sir.

Q. Do you have a house meter? A. Yes.

Q. On each building?

A. I am not sure whether that is one central point or whether there is a house meter at Kenwood.

Q. You don't know then whether you have primary metering or individual metering for those 72 buildings?

A. My recollection is that whichever kind we have we are getting [203] combined billing. The rate

(Testimony of Herman B. Sarno.)

goes all the way down. We don't pay for each building as if it belonged to a separate owner. It is all on one tract like these buildings.

Q. Then you must have 72 meters if it is like these buildings?

A. It is like these buildings in the respect it is 72 individual buildings and not one multi-story building and it is on extended land area and 2-story garden type buildings.

Q. Do you have 72 meters or one meter?

A. I can't be very certain.

Q. You don't know? A. I don't know.

Q. All right. I want to ask you, is there a meter in each of the tenant's apartments? A. Yes.

Q. They pay their own?

A. Well, the meter, I think, is in the basement.

Q. I mean the meters for each tenant?

A. Yes, there is a meter for each tenant.

Q. Who owns the distribution facilities, outside distribution facilities?

A. It is not the City of Toledo. It is a private power company.

Q. Do you know the name of that company?

A. I think it is Ohio-Edison, but I am not certain.

Q. You are unable to say though whether or not they combine the house meters, combine the readings or whether you have [204] one primary meter which serves all of the houses? A. No, I am not.

Q. Do you have any other similar situations?

A. No.

(Testimony of Herman B. Sarno.)

Q. You don't have any others?

A. No. We have in Georgia and South Carolina relatively the same situation in that we have motels which are separate buildings and they are separated from each other and we get one rate. The rate goes all the way down the line.

Q. That is transient, isn't it, hotels and motels?

A. Well, as distinguished from this there are no tenants paying their own electricity. We pay the whole bill.

Q. I see. Is that on one meter? A. Yes.

Q. One meter for the whole project?

A. That is correct.

Q. Mr. Sarno, this idea of putting in your own wiring and connecting up the houses with your own wiring system, wasn't that your idea?

A. Where do you mean, Mr. Rader?

Q. Up here on Richardson Vista?

A. You mean connecting—was it my idea to do it?

Q. Well, what were the proposals that you put to Mr. McKinley?

A. I inquired why we couldn't get—I don't know what the word is, but a rate so that we could get the benefit of [205] volume consumption, why each one of these buildings were treated as if it were separately owned and a separate customer when it was a one-company ownership. I didn't request that we get combined billing for all the companies, but for each corporate entity and the problem arose as to

(Testimony of Herman B. Sarno.)

how it could be done. I said, "If there is any way we can do it that, even if it involved some expense to us, if the expense isn't out of line, tremendously out of line with the saving, we will be glad to do it." Mr. McKinley said, "There is no way." And thereupon we got our own engineer and had him make a study and he said, "There is a way."

Q. What way did he determine to be a way?

A. He said if the City would permit us to have a central meter that if that could be done that we could wire all the buildings together and have two services into each building. Mr. McKinley said that couldn't be done, that that violated the code. Thereupon, I had the conference with you and you called Mr. McKinley in and Mr. McKinley again repeated his objections and his interpretation of the electrical code and, as you will recall, neither one of us agreed to it and that is when we thought there should be an interpretation. That is why we got the letter.

Q. Mr. Sarno, your engineers were the first ones to come up with the possibility of putting two services to a building instead of one, weren't they? [206]

Mr. Cottis: Objection, your Honor, on the ground it is obviously outside the scope of this witness' knowledge. He doesn't know what went on in 1951.

Mr. Rader: If it please the court—excuse me, counselor.

Mr. Cottis: And it would be hearsay.

Mr. Rader: If it please the court, now the only reason this is important is for this reason: That Mr. Sarno and his engineers were the first people

(Testimony of Herman B. Sarno.)

who brought up this possibility of two services to one building and that is the first time that the National Electrical Code, so far as we are aware of, was ever mentioned and it was last summer and the National Electrical Code has bearing on that and has bearing on none of the rest of this.

The Court: The objection is overruled. You may answer.

Q. Your engineers are the ones that came up with the idea of two services, aren't they?

A. No, that isn't so. I was told by Lela Hall that—this was long before the institution of the lawsuit when they were talking to the City Manager before the controversy arose—the City Manager said, “Well, it can be done. There is no need for it. You can accomplish it by billing. Why should you spend the money.” Having that in mind we approached Mr. McKinley hours after I had been to the City council and made the proposal. The City council was amenable, apparently [207] amenable, and they said to consult with Mr. McKinley and try to work out something. We then said, “If nothing else let us do this,” and Mr. McKinley said, “It can't be done. It violates the code.” Then we got our own engineers and they said it could be done, that McKinley was wrong. I again sought a conference with you to get it clarified. We were willing to do it. Mr. McKinley then agreed it could be done legally and that the code didn't bar it. Mr. McKinley gave us some figures that seemed to make it

(Testimony of Herman B. Sarno.)

impossible and those figures, on recheck, we found where he was a little pessimistic about the price we could get it done for.

Mr. Rader: If it please the court, will you instruct the witness to just answer the questions. He is an attorney and ought to know he shouldn't do that. It may be correct, but I have a purpose in mind when I ask a question.

A. I am sorry, Mr. Rader. I will co-operate.

Q. Now, when you came up with this idea of two services or when your engineers said it was feasible and it could be done they threw the National Electrical Code at you, is that correct?

A. I am sorry, I don't understand your question.

Q. In other words, Mr. McKinley said, "No, we can't do that because of the National Electrical Code"? A. That is correct.

Q. Now, you had conversations as to why. What were the conversations [208] as to why the meter readings weren't merely combined, leaving the wiring as it is? What were those conversations?

A. Mr. McKinley said—it was obvious, the City refused to do it. That is why the lawsuit was pending.

Q. Now, wait a minute. He didn't say anything about the National Electrical Code as being the reason for not doing that? A. No.

Q. The National Electrical Code has nothing to do with conjunctive billing or combined——

A. Are you asking me a question?

Q. I am asking you a question.

(Testimony of Herman B. Sarno.)

A. I don't know that it does or does not. There was never any discussion about the electrical code bearing upon combined billing which was involved.

Q. And you discussed you wanted combined billing, didn't you?

A. It was the reason the lawsuit was pending and that is the crux of the matter. Briefs had been prepared. Of course, I wanted it.

Q. Now, when you went to Mr. McKinley and the City people and asked for combined billing, what did they tell you about that?

A. They said they wouldn't do it.

Q. They said they had a policy against it, didn't they?

A. No, they never. I never heard the word "policy" mentioned, ever. [209]

Q. All right. Go ahead. What did they say?

A. They said that they couldn't do it because if they did—they cited an illustration that they would have to give the Bank of Alaska with 4 or 5 branches the same privilege and I called to them that that was not the fact, that we were not like the Bank of Alaska and that we were entitled to it because our buildings were contiguous on the same piece of ground and there was a general practice followed everywhere and it did not involve the Bank of Alaska or anybody else except multiple dwellings garden type apartments which were being discriminated against in that there was no reason for Mt. McKinley or "L" Street, which was built in the air, to get combined billing and the garden type not

(Testimony of Herman B. Sarno.)

to get the combined billing.

Q. Didn't I merely ask you what Mr. McKinley said as to that——

A. That is exactly what Mr. McKinley said. He said if he gave it to us he would have to give it to everybody who had more than one unit in the City, so I said to him, it is not the same thing.

Q. I didn't ask you what you said to him. I asked you what he said to you?

A. That is what he said.

Q. All right. He said what he did for you they would have to do for everyone else and you insisted it wasn't correct, in substance? [210]

A. I repeat what I just said. It happened the way I said it. If you want to interpret what I said——

Q. Is that an incorrect interpretation?

A. No, essentially it is correct.

Q. Essentially that is what happened?

A. Correct.

Q. Didn't Mr. McKinley say, "Our policy is not to combine. If we combined them for you we would have to combine them for everybody else"?

A. Mr. Rader, the policy was never mentioned as such. I assume the way he said it that it was their policy, apparently, but the word policy was never mentioned. He said, "We can't do it for you because we would have to do it for everybody else."

Q. Now, you stated in one of your answers here awhile ago there was a general practice to combine

(Testimony of Herman B. Sarno.)

these meter readings on apartment houses located as these are, where the tenants have a meter and the house has a meter in each house. Now, I would like to have you tell me where that general practice obtains?

A. The City of New York and the District of Columbia. Let me make myself clear. In the City of New York you can have not only an apartment house, you can have 2 hotels, 3 hotels, or 15 hotels as long as they are physically contiguous, they do not even have to be owned by the same corporate entity, [211] and you get a combined rate.

Q. You mean that if John Doe owns Hotel A and Tom Smith owns Hotel B they get a combined rate for both hotels?

A. No, sir. I said if it is the same interest although not the same corporate entity. A man can own 3 hotels with 3 different corporations and if it is the same factual ownership, interrelated ownership, that primarily the test is whether it is contiguous and without ownership by a stranger, a third person.

Q. In other words, they do away with the corporate veil? A. That is correct.

Q. That is in New York? A. Yes.

Q. What company?

A. Consolidated Edison.

Q. Do they combine meter readings?

A. Yes.

Q. Under those circumstances?

A. Well, I don't—under what circumstances,

(Testimony of Herman B. Sarno.)

Mr. Rader? You mean if there are two separate corporate entities or if it was the same legal ownership?

Q. Well, you have stated it didn't make any difference, didn't you? A. Yes.

Q. Well, then answer the question. For either one of them? [212] A. Yes.

Q. They do combine meter readings?

A. My understanding is they do regardless of what corporate entity, whether separate corporate entity or the same corporate entity.

Q. It is your understanding they do?

A. Yes.

Q. You don't know——

A. Not only that, Mr. Rader, but in the Consolidated-Edison Company it is permitted to give all of the tenants their electricity and put it all in—combine all the meters for all the tenants, add those to the house meter and pay one bill predicated on the combined reading of all the tenants, including the owner of the property, in an apartment house.

Q. That is the situation with Consolidated-Edison in New York? A. That is correct.

Q. You say that is done in Washington, D. C., also?

A. My understanding is it is done in the District of Columbia. Well, you said—I don't know that they permit you to combine all the meters of tenants—what did you mean?

Q. Well, Mr. Sarno, let me put it like this to you: Assuming that your project on Government

(Testimony of Herman B. Sarno.)

Hill, Richardson Vista, were picked up and bodily set down in New York. Is it your contention——

A. You would get a combined billing. [213]

Q. They would have all of the house meters and give you the advantage of the combined rate?

A. My understanding is they would give you your choice of metering them together or if that presented extraordinary hardships in cost they would give you a combined reading and combined billing.

Q. And the same is true in Washington, D. C.?

A. I think the same is true of Washington, yes. I can check Washington for you on the phone in a few moments.

Q. Do you know where else it is true? Incidentally, what is the company in Washington, D. C., which does that?

A. I believe the name is Patomic Electric. I am not altogether certain about Washington, but my recollection is that the condition exists in Washington. But the condition is not uncommon, Mr. Rader. You know that.

Q. Let me ask you, is it your contention it is also not uncommon for utilities companies to act in precisely the same manner as the City of Anchorage? That is not uncommon either.

A. I have never known in all my experience, Mr. Rader, for any public utility to be so determined about something in which it is so unreasonable, which the City of Anchorage has been, about their litigation and about their state of facts.

Q. I am asking you if you know whether it is

(Testimony of Herman B. Sarno.)

common or not for utility companies to insist on metering in precisely the same manner the City of Anchorage has insisted on metering in [214] your case right here now?

A. I don't know anything about what the City of Anchorage insists on metering. I have never had that problem what they are insisting on being done.

Q. We insist on not combining your meter readings, don't we?

A. Yes, obviously you do. That is why we are here.

Q. You don't know of any other place that does that?

A. Well, I have never met the experience. I will say that.

Q. That is all I ask you for. Now, Mr. Sarno, this letter that Mr. McKinley wrote to you on October 11, was that before or after your engineers had worked on the same thing?

A. I believe that was after.

Q. After your engineers had worked——

A. After our engineers said—I think I have a memorandum here that will permit me to answer your question precisely.

Q. Mr. Sarno, who were your engineers?

A. What is the name, Mr. Harland? I have to ask Mr. Harland.

Mr. Harland: Mr. Erickson.

Mr. Hellenthal: I have a copy of Mr. Erickson's report.

(Testimony of Herman B. Sarno.)

Q. Mr. Sarno, I want to ask you whether or not Mr. McKinley didn't tell you about this October 11 letter when you were discussing those matters, tell you that this was a possibility and he might be able to work something out but that it would take the council's approval to do it?

A. I don't know what you mean by the October letter. [215]

Q. The October 11 letter which is Plaintiff's Exhibit No. 4. I will hand it to you.

(Thereupon, the document was handed to the witness.)

A. Incidentally, to answer what it is may I have the copy of the letter to the Underwriters. What is the date of that, please?

Mr. Cottis: It has been marked for identification.

A. We got a report from our engineers on July 3.

Q. 1954? A. Yes.

Q. And that was directed to generally 2-point service to each building and putting all of the house meters on one circuit? Is that correct?

A. Not necessarily all of them; as many as would be practical to put together. It was pointed out under the rate that it wouldn't do any good to put more than a certain amount together because the rate stopped at a certain point.

Q. So your report from your engineers was dated July, 1954?

(Testimony of Herman B. Sarno.)

A. July 3 and Mr. McKinley wrote, I believe, on July 19 and now my recollection is that you and I met with Mr. McKinley shortly after July 3 because you may recall I didn't get a copy of the letter that Mr. McKinley was supposed to write and I complained to you and asked you why I hadn't gotten a copy, did it go out. Then later the letter, apparently, did [216] go out because we got a copy.

Q. You did get a copy eventually?

A. Yes.

Q. Now, I want to ask you, when Mr. McKinley was discussing it with you didn't he say, "Perhaps this was a possibility. We will look into it and look into the fire angle then see if we can come to an agreement and take it to the council"?

A. Mr. Rader, he didn't say that, sir. You know it very well.

Q. What did he say?

A. He said he didn't think it could be done, that it violated the Underwriters code and he pointed to a section there when you were present and he said this section prohibits it, his interpretation of this section prohibits. I disagreed with that and it was agreed the letter would be written. He never at that time—prior to the writing of the letter he was very skeptical it could be done. He never suggested that it could be done. Apparently some time later he did write a letter in which he said it could be done and offered to help, but I think he pointed out it would be too costly; it wouldn't pay.

Q. He considered that a proposal that you were

(Testimony of Herman B. Sarno.)

making to the City of Anchorage to put up some of your own wiring there, didn't he?

A. I don't know what he considered.

Q. Do you think he considered it anything [217] else?

A. I don't know what he considered. He was apparently trying to help us then to get a lower dollar amount that we would pay for our current if it could be done and he was willing to be co-operative and he was willing to have it done if it didn't violate the Underwriters Code.

Q. Mr. Sarno, is your claim of discrimination by the City of Anchorage based upon the fact that an apartment building, a single apartment building, has a single meter whether it is 14 stories high or two stories high?

A. Well, not precisely in that language but essentially that is correct. My claim is that we ought to pay the same as McKinley or any multi-story building per kilowatt hour of electricity. We buy just the same as they do and the fact we have more than one structure, instead of one, has nothing to do with it. It doesn't cost the City any more for service to us than it does to them. It would cost minutely more to read the meters. Apparently our company at the time when I had no connection to it was permitted, I understand, was promised that that would happen, that they would get the benefit of this rate and I see no reason why we should pay more than McKinley or any of the multi-story structures in this city per kilowatt hour for electricity.

(Testimony of Herman B. Sarno.)

Q. You talk about the McKinley here. That is an apartment building 14 stories high, something of that nature? A. Yes. [218]

Q. With how many units?

A. Approximately 200 I understand.

Q. 200 apartments and you are familiar with the fact that each one of those apartments has a separate meter on it that the tenant pays?

A. Yes. I am not sure, but I understand that is so.

Q. You understand that to be the fact?

A. So are ours.

Q. And you understand that in that apartment building there is one house meter?

A. I understand that, that is correct.

Q. And you understand that in each of your apartment buildings there is similarly one house meter?

A. But that seems to me to be the height of absurdity. That distinction to me is no different and it seems to be a distinction without a difference.

Q. Excuse me, Mr. Sarno, your counsel will argue your case for you. You merely answer my question. There is one house meter in the 14-story apartment building just like one house meter in every one of your apartment buildings, is that correct?

A. Yes, Mr. Rader. By the same token we have a building in E & E which has 33 units. Why does

(Testimony of Herman B. Sarno.)

E & E pay less per kilowatt hour of electricity than Panoramic View or Richardson Vista or any of the other projects? What has the size of [219] the building got to do with it? Why do we get a lower rate in E & E? In effect, we pay less per apartment per month in electricity than we pay in Richardson Vista.

The Court: You have answered the question. You shouldn't be arguing.

Q. You do admit in every one of these instances you have cited that there is one house meter for each apartment building, is that correct?

A. That is correct and it goes for E & E also.

Q. To the best of your knowledge on this project, or any other project you have mentioned here, in no instance have the meters on two different buildings been combined into one billing to give a lower rate, have there?

A. Well, I have talked about a lot of projects.

Q. I am talking about in the City of Anchorage; the projects you have mentioned in the City of Anchorage?

A. I will take them one at a time. E & E has approximately, I think, 33 apartments per building. We get the rate right down the line and we get the bottom billing. Our electricity in E & E, our own project, costs us substantially less than it does in the plaintiff companies and I see no reason for the distinction.

(Testimony of Herman B. Sarno.)

Mr. Rader: If it please the court, that isn't an answer to my question.

The Court: You better confine your answer to the question. [220]

A. I am sorry. Would you—may I have the question read, please?

(Whereupon, the reporter read Question, Line 15, Page 220.)

A. I don't know of any, no. (Pause.) Mr. Rader, are you talking about in Anchorage?

Q. I am talking about in Anchorage.

A. I don't know of any, no, sir.

Q. So far as you know the City is at least consistent in not combining meter readings for apartment buildings inside the city limits?

A. That is correct. I don't know. They may have done it. I have no knowledge, but I don't believe they have. I am not qualifying the City's consistencies. I think they are consistently wrong.

Q. So far as you know there is no basis for the discrimination on combined meter readings?

A. You mean garden type apartments?

Q. I mean the fact we don't combine meters for you is no discrimination against you because we don't do it for anyone else.

A. I have no information whether you do or don't.

Q. To the best of your information?

A. I am sure you don't. I am sure you don't

(Testimony of Herman B. Sarno.)

treat me any different from anyone else. I have no such claim.

Mr. Rader: That is all. [221]

A. That is, as far as the category refers to garden type apartments.

Mr. Rader: Pardon?

Q. You may apparently treat everybody with garden type apartments the same, but you don't treat everybody with multiple housing units the same.

Q. (By Mr. Rader): I want you to tell me what the difference is in the metering between one and the other?

A. I don't know anything about how McKinley is metered.

Q. You say we treat them differently?

A. My understanding is that McKinley gets this under the same rate schedule that we have; they combine all of their electricity used in the halls and in the public areas and gets the rate all the way down the line with the corporation. The corporate customer, whoever McKinley is, I don't know the name of it, gets treated differently than Richardson Vista or Panoramic View in that respect. We do not get the rate all the way down the line the way they do and we pay, therefore, more per apartment or per cubic foot of space, on any calculation, for electricity than they do.

Q. Now, if your apartment buildings, instead of being 2 stories high were 4 stories high—

A. I am sorry.

(Testimony of Herman B. Sarno.)

Q. Assuming your apartment buildings were 4 stories instead of [222] 2 stories high, is it your contention we should change your metering because of that?

A. No.

Q. Assuming that your apartment building was 14 stories high instead of 2 stories high, should we change your metering on that account?

A. We have not asked you to change our metering, ever.

Q. You are not contending that on your billing?

A. Your billing, yes.

Q. All right. Now, your apartment buildings are 2 stories high. If they were 3 stories high, is it your contention that we should change your billing because another story is added to them?

A. We don't ask you to change our billing in any respect. Our contention is that Richardson Vista is a corporation owning several hundred apartments consuming current, the same kind of current, on the same schedule as McKinley and the other multiple story buildings, your customers, but instead of billing our total electricity at one rate we are buying it at a substantially higher rate than you charge our competitors who are in exactly the same line of business for the same kind of electricity.

Q. How many points of delivery do we have to your corporation for house meters?

A. I assume that you have one for every [223] building.

Q. How many is that for you, then?

(Testimony of Herman B. Sarno.)

A. I believe that is 19 for Richardson Vista.

Q. 19 points of delivery? A. Yes.

Q. So to buildings that are spread on how many acres—23 acres or thereabouts?

A. Yes, I think Richardson Vista has 23 acres.

Q. Now, the Mt. McKinley that you keep talking about occupies how many acres?

A. Oh, barely an acre, I suppose.

Q. And how many points of service do we have to the Mt. McKinley apartment building? (Pause.)

We have one, don't we? A. I guess you do.

Q. One as contrasted with 33 for you?

A. No, 19.

Q. 19, excuse me. A. Yes.

Q. One on one acre as contrasted to 19 on 23 acres?

A. But that is not important, Mr. Rader, because you don't need 19 points of delivery to us. You could put one meter at one point and solve the whole problem. You don't need 19 or 9 or 2. You only need one. You could get one meter to meter every bit of electricity in those buildings, just like you do in McKinley.

Mr. Rader: That is all. [224]

Redirect Examination

By Mr. Cottis:

Q. Mr. Sarno, in connection with Mr. Rader's last question, each service drop to each one of your buildings serves 22 tenants plus the house, is that correct?

A. The City collects from each service drop, they

(Testimony of Herman B. Sarno.)

collect from 22 tenants; a lot of money at a very high rate as well as giving us the service to that building on that one drop and that one line is a tremendous advantage to them.

Q. And their rates to the tenants are domestic rates? A. Domestic rates.

Q. Now, Mr. Rader has gone pretty far in questioning you, but as I understand your answers you are not concerned with how many meters there are on your properties on Government Hill, is that right?

A. I don't think Mr. Rader has gone very far. I think he has done an excellent job and has been very fair, but—to answer the second part of your question, I don't remember what it was.

Q. You have no concern with how many meters the City wants to hang about your structures, do you? A. No.

Q. If they want to put 17 meters in each building to make your [225] house current, you don't mind, do you?

A. We might have some concern about it getting in the way, but outside of that we wouldn't.

Q. What I am getting at, all that you have contended in your discussions with Mr. McKinley and other City officials and in connection with your own engineering studies, is that you are not getting the most favorable rate that is legally available to you?

A. That is correct.

Mr. Cottis: I have no further questions.

(Thereupon, the witness was excused and left the stand.)

Mr. Hellenthal: At this time will counsel for the defendant stipulate that in the case of the Mt. McKinley Apartment House, which is owned by the Coffey House Corporation, that there are separate meters for each of the tenants and that there is one meter to measure the house power and that there is one other meter to measure the elevator motor power, which is in excess of the limitation of the rate schedule? The reason I asked that is the questions that counsel asked indicate that he believes that to be true and it would save time if he would so stipulate.

Mr. Rader: I would so stipulate. I shall further request in that stipulation, I don't think there will be any objection to it, that it is 14 stories high, that it contains approximately 200 apartment living units, that it occupies approximately one acre of ground, and that there is one point of [226] service by the City of Anchorage to that building.

Mr. Hellenthal: I will so stipulate except I would like to ask a question about the number of tenants in that building. 200 seems kind of high to me.

The Court: I suppose the precise number would not be material.

Mr. Hellenthal: 120 I am informed is closer.

Mr. Rader: That is fine.

Mr. Cottis: The one property is on 2 city lots and the other is on 5 acres, I believe.

Mr. Rader: If you want some more information on that, there is one house meter for power, one house meter for lights, being a different classification under our schedule, and Mt. McKinley offices,

I understand, occupies one of the apartments so there would be another house meter in their name. It is not a house meter, the apartment building which they occupy as offices.

Mr. Hellenthal: I think the reason was, as I stated, the power meter is because of the elevator motor. Now, the acre that you refer to consists of 2 subdivided City lots, does it not?

Mr. Rader: Frankly, I don't know. I imagine that it does. Well, now, is that the same situation——

Mr. Hellenthal: I am confining myself to Mt. McKinley.

Mr. Rader: I would like to inquire and ask if we can make another stipulation as to [227] 1200 "L"?

Mr. Hellenthal: As soon as we finish with McKinley I will go to 1200 "L." Do you so stipulate the McKinley consists of 2 City lots?

Mr. Rader: Yes.

The Court: Will somebody tell me why that is important?

Mr. Rader: I haven't the slightest idea.

The Court: It is a waste of time to dwell on these immaterial things.

Mr. Hellenthal: Your Honor, you recall the brief we furnished your Honor a week ago. In that brief is a case called Philadelphia Suburban Water Co. v. Pa. Public Water Co. Commission. That case dealt with the Colonial Housing Project which was an F.H.A. project and similar to these F.H.A. projects.

The Court: I want to know why it is material to show it was subdivided?

Mr. Hellenthal: The court in that case made some point of it and we are just trying to bring our clients squarely within the rule of that case and that is the only reason that I asked for it.

The Court: You can find a thousand cases and if you tried to bring yourself within the facts of each one of them we would be here a long time.

Mr. Hellenthal: That is the only reason we did it.

The Court: I am not going to pay any attention to the stipulation of that fact. I think it is wholly immaterial and just [228] takes up the time of the court.

Mr. Hellenthal: Now, Mr. Rader, can you stipulate that the 1200 "L" Street Apartment is owned by a corporation known as the 1200 "L" Street Corporation?

Mr. Rader: I don't know who owns it.

The Court: It wouldn't make any difference anyhow.

Mr. Hellenthal: That it has the identical services that you described for the McKinley apartments except that I don't know about the office?

Mr. Rader: I think so. I will say they are identical. If you can find anything contrary——

Mr. Hellenthal: I would like to have a stipulation—I do think this is material. Can you stipulate?

Mr. Rader: Well, Mr. Hellenthal, I am as ignorant about that other office as you are.

Mr. Hellenthal: Forget about the office.

Mr. Rader: I will stipulate to the rest of it.

Mr. Hellenthal: The services are as described for its twin, the Coffey House Corporation, also a 14-story apartment building?

Mr. Rader: Yes, and the further stipulation, if it is of importance to you, that that is not on 2 city lots.

Mr. Hellenthal: That is on 5 unsubdivided acres, if you think it is material.

The Court: I don't want counsel getting into discussions [229] I have ruled out.

Mr. Cottis: We will call Robert W. Retherford.

ROBERT W. RETHERFORD

called as a witness for and on behalf of the plaintiffs and, being first duly sworn, testifies as follows on

Direct Examination

By Mr. Cottis:

Q. Your name is Robert W. Retherford, R-e-t-h-e-r-f-o-r-d? A. Yes.

Q. Where do you live, Mr. Retherford?

A. In the outskirts of Anchorage.

Q. And what is your profession?

A. I am an electrical engineer.

Q. Do you have any college degrees?

A. Yes, Bachelor of Science in electrical engineering from the University of Idaho.

(Testimony of Robert W. Retherford.)

Q. Did you undergo specialized training in connection with electrical matters for the Navy during the last world war?

A. Yes, there was some specialized training while I was in the Navy.

Q. Are you a registered electrical engineer?

A. I am a registered engineer in the Territory of Alaska and in the state of Idaho.

Q. Are you a member of any professional [230] society?

A. I am a member of the American Institute of Electrical Engineers.

Q. Have you ever published any papers concerning electrical engineering?

A. A few.

Q. For what publications?

A. One of them was published in the *Electrical World* and another in some university magazines.

Q. How long have you lived in the Anchorage vicinity?

A. Well, it will be 5 years this fall.

Q. What was the nature of your business when you first came to Anchorage?

A. Well, shortly before I came to Anchorage I was in the consulting engineering business in the Northwest and came to Anchorage as an employee for Chugach Electric Association.

Q. Employed in what capacity?

A. As their system engineer, Chief Engineer, I guess you would call it.

Q. And how long were you the Chief Engineer for Chugach Electric Association?

(Testimony of Robert W. Retherford.)

A. Until the first of June, 1954.

Q. What have you been doing since that time?

A. I have been in private practice since then.

Q. Private practice as a consulting electrical engineer?

A. Yes. [231]

Q. Do you employ other engineers?

A. Yes. I have 4 men of various classifications.

Q. And then you have other office help and that sort of thing?

A. Yes.

Q. And you are the owner of that consulting engineering business?

A. That is correct.

Q. You have also done consulting engineering in the States, have you not?

A. Yes, that is correct.

Q. Where and when?

A. I was a partner in the firm of Howard Senior and Associates with headquarters in Vancouver, Washington, doing work in Oregon, Washington and Idaho.

Q. What kind of work?

A. Well, it was work for R.E.A. Co-operatives and Public Utility districts in those 3 states in connection with the construction of distribution and transmission lines, substations and system studies concerning feasibility.

Q. And what years were they?

A. Well, that was in the years directly following World War II up until 1950 when I came to Alaska.

Q. Did your work while you were in the Navy concern electricity?

(Testimony of Robert W. Retherford.)

A. Yes, it was indirectly involved. (Pause.) Well, moderately. It was both electronic and electric. It was in mine warfare involving various electronic and electric devices. [232]

Mr. Cottis: Your Honor, I consider Mr. Retherford qualified as an expert and if Mr. Rader doesn't——

The Court: I don't know yet what you want to qualify him as an expert on.

Mr. Cottis: On electrical engineering in connection with distribution—installation system; engineering concerning the installation.

The Court: I want to know whether you want to qualify him as an electrical engineer or as a rate expert?

Mr. Cottis: Not as a rate expert, your Honor.

The Court: Very well.

Mr. Cottis: If Mr. Rader wants to examine further as to his qualifications——

Mr. Rader: No, I think Mr. Retherford has been ably qualified.

Q. (By Mr. Cottis): Mr. Retherford, are you familiar with the distribution system installed on Government Hill for Panoramic View and Richardson Vista?

A. Yes, I am generally familiar with it.

Q. How did you get familiar with it?

A. Well, I visited the area. I have seen the installations.

Q. Have you examined any of the drawings in connection with it?

(Testimony of Robert W. Retherford.)

A. I have seen some of the drawings, yes.

Q. So you have a general familiarity with [233] it?

A. That is correct.

Q. Mr. Retherford, I will put before you Defendant's Exhibit H and ask you whether it portrays the distribution system in connection with those two establishments?

A. Well, it outlines in general detail the location of the lines and the transformer banks.

Q. Can you describe for us the electrical system, using, if it would be helpful, that Exhibit H?

A. Well, the projects, as I observed it, are served from the substation located here (indicating) which establishes the 33,000-volt transmission line and passes along Bluff Road. From that substation the distribution system——

Q. Excuse me, the substation is designated as such on that exhibit, is it not?

A. Yes, it is listed as Substation No. 5 on this drawing. That substation steps the voltage down from 33,000 to normal voltage of 4,160, I believe, and this distribution voltage is carried on other lines through the projects to individual transformer banks. These transformer banks in turn step the voltage down again to the voltage which is utilized in the buildings.

Q. Could you describe the distribution system between the transformer banks and the meter boards and the ultimate consumers in the apartment buildings?

(Testimony of Robert W. Retherford.)

A. From an inspection of the drawings of the buildings themselves [234] and looking at the lines, the last transformer bank has stepped the voltage down to the utilization voltage connecting 2 service drops which go to the building, either directly from the transformer bank or through a series of secondaries to other buildings nearby and these are arranged in groups on the inside of the building. The main entrance goes to the individual meters serving the tenants and the house on their separate circuits.

Q. From your observation of the installation, how would you characterize it further? How would you classify it?

A. Well, I would classify it as reasonably typical of an installation for a group of buildings of this kind.

Q. What is its classification as to whether it is single phase or 3-phase?

A. Yes, I guess I should add that. I believe that the buildings themselves are served with what is known as single phase, 122 4-volt 3-wire service.

Q. What sort of load is handled by the house circuits in connection with those buildings?

A. It is my understanding, from looking at the drawings, that the house circuits serve the lighting that is supplied by the owners of the building, it serves the small motors that are used in connection with the heating system and probably serves the laundries and other appliances that might be placed there by the owner. [235]

(Testimony of Robert W. Retherford.)

Q. From the point of view of an electrical supplier, is that a desirable type of load?

A. Yes, generally speaking that type of load is a reasonably consistent load. It is year 'round in nature. The fluctuation might be classed as a little bit better in character than the residential load, as an example, that is, each one of those may vary but generally speaking that type of load is a desirable load from the standpoint of utilities.

The Court: We will recess for 5 minutes.

(Whereupon, at 4:25 o'clock p.m., following a 5-minutes recess, court reconvenes, and the following proceedings were had.)

Q. (By Mr. Cottis): Mr. Retherford, you have examined Defendant's Exhibits C, D, E, F and G which are the various electrical tariffs that have been in effect, have you not?

A. Yes, sir, I have seen them from time to time.

Q. In your opinion, Mr. Retherford, do the published tariffs, as set forth there, appear to preclude the opportunity for such establishments as this to obtain the benefits of single point service?

A. No, I see nothing or have seen nothing in any of these published rates which would preclude a commercial establishment such as this from obtaining the benefit of a single point of delivery. [236]

Q. How could these two establishments obtain such benefits?

A. Well, a single point of delivery or the benefits

(Testimony of Robert W. Retherford.)

of single point of delivery can be obtained in several ways and in listening to the proceedings here so far I am of the impression that there is some confusion perhaps existing. I am an engineer, shall we say, and what I have heard leads me to think there may be a little confusion existing as to the difference between the delivery of power to a premises and the metering of that power. Now, those two things are different in nature. The metering of the power can be done in many ways. The delivery of power is generally the major item of expense and the best method of accomplishing that is often dictated or practically always dictated by the economics of getting the power to the user. The method of metering can be handled in many ways and it is a simple technicality, so to speak. It can be done in many ways and I am very much interested personally as an engineer that all of you who may be trying to understand this clearly see the difference between the delivery of power and the metering of that power. I will mention three arrangements that could be used to meter this power. One of them is what you call primary metering. The word has been used here. In primary metering it consists of the installation of a metering arrangement at some point where all power supplied the project passes through that one point and that usually occurs and takes its name "primary" from the [237] fact it is generally done on the higher voltage lines, the distribution line itself. The metering is accomplished at the higher

(Testimony of Robert W. Retherford.)

voltage level and takes its name "primary metering" from that fact. There is another way of metering all the power that flows to a particular project, group of buildings or whatever it might be, called "secondary metering." This metering is done on the low side of the transformer banks that are involved in the project and that would entail the interconnection of facilities on the secondary side passing all the current through one point to the secondary system and metering it at that point. The third method, and in this case is probably the one that is far more practical than any of those I have mentioned so far, is the simple method of totalizing which involves only the installation of distribution to totalize the readings of the meters that are installed as presently arranged in these buildings. That can be done. It can be done fairly reasonably, but there is some expense attached and there might be some question as to whether there is a good reason for installing a totalizing meter when you simply take the readings of it, add them up and produce the same results. In the case of this last method I will have to point out that the user, the final consumer gains one benefit that he should reimburse the utilities for and that is that he does not pay for some of the losses that the utility suffers in delivering the power to that point. In [238] addition he does not pay for a share of the investment which the utilities may have made in order to interconnect his buildings. Now, in the case of primary metering

(Testimony of Robert W. Retherford.)

the owner of the project, we will say in this case, may own all of the facilities beyond the meter, if he does then there is no question of that kind, however, where individual tenants in these apartment buildings are being metered there would be complications arising. When you come down to the billing of individual tenants using the owner's lines that aren't owned by the utilities and so forth, it can get complicated. The simplest way, I believe, is the way it is arranged there right now and that in considering this commercial establishment as one user of a commercial classification, which it is, and the facilities in the same identical classification as the apartment buildings you have pointed out, it is one user. It is a commercial user. It is the same class as those buildings. I see no reason why, especially if there has been a meeting of the minds prior to the beginning of the project, as has been testified to, that the client is one consumer, this consumer would not be given the benefits of single point metering.

The Court: I didn't know the parties were in dispute on that. I don't know why it couldn't be stipulated to.

Mr. Cottis: Frankly, your Honor, if the defendant will stipulate to the fact that there is nothing in the City tariffs [239] or regulations or ordinances which prohibits the benefits of that one point service, I should think we would be entitled to summary judgment.

(Testimony of Robert W. Retherford.)

The Court: That isn't what I have in mind that he would stipulate to, but that he stipulate that it could be done in this way.

Mr. Cottis: Without violation of City regulations and ordinances?

The Court: I don't think he would be required to go that far. In other words, this witness would not be able to go that far.

Mr. Cottis: He has testified that he sees nothing in the published——

The Court: That is not binding on me. I have got to determine the law, not the witness. So it seems to me that all other matters except his idea of the law could have been stipulated here, that is, at some saving of time. I think in the stipulations of the City the other day is the admission that it could have been handled this way by the City, but that the City didn't choose to do so and that it has that latitude, that it can adopt some other course, and as long as it is reasonable and not arbitrary and discriminatory that is all the City is required to meet.

Mr. Cottis: The City may have been willing to stipulate that it was the boss and could do what it pleased, your Honor, but I don't—— [240]

The Court: No, I mean all these facts to which the witness has testified concerning the delivery of current to these buildings and distribution. That is certainly something there can't be any controversy about.

(Testimony of Robert W. Retherford.)

Mr. Cottis: There will be a controversy about the conclusion, possibly, that he has testified to—that the reason there is a separate house meter on each building is because it is the most economical way to supply the power irrespective of the metering problem.

The Court: Well, if the proposal was made to stipulate to these facts and it developed that was one to which the parties agreed then the defendant could have been limited to that one point.

Mr. Rader: If it please the court, we have listened to Mr. Retherford's testimony and I don't agree with some of his conclusions altogether, but certainly his factual statement as to the method of doing this and also to the fact that the cheapest and most economical method of doing it is totalizing the metering, totalizing the bill, providing you would treat them as one customer, is the most economical method, we agree with him. He is a hundred per cent correct. We will go that far in a stipulation.

The Court: Well, but a stipulation is too late. I am making this observation now to counsel not to be putting somebody on the stand to testify to something to which there is no controversy or to which a stipulation may be arrived at. [241]

A. Maybe I was going a little bit overboard there because I probably have been somewhat confusing you by the layman's language on this subject and I was merely trying to clarify it from an engineer's point of view.

(Testimony of Robert W. Retherford.)

Q. (By Mr. Cottis): From an engineer's point of view, Mr. Retherford, what is the difference, if any, between the commercial house current used in connection with the 1200 "L" Street Apartments and the McKinley Apartments and the plaintiffs here?

A. Well, there is no basic difference. The only difference is physical isolation of one unit from another and that difference, if you want to bring it down into specific items, consists primarily of the wiring involved to tie them together. In the case of your 1200 "L" and McKinley buildings, the owner provided the wiring to tie all the floors of that building together, to inter—tie all of the house electrical circuits to one point. It is my impression he could have done the same thing in Panoramic View, but he was under the impression it may not have been necessary because it was cheaper to do it the way it is done now.

Q. And there is no basic electrical difference, then, from an engineering point of view?

A. No. The only difference is this physical one I explained which involves the physical—which interconnect the circuits of the owner. [242]

Q. Now, you mentioned something about there being a difference under some of these possible systems in electrical losses due to losses within the transformer and the length of the electrical lines. Can those line and transformer losses be measured with precision?

(Testimony of Robert W. Retherford.)

A. They can't very readily be measured with precision, however, there are calculations that can be made and there are many cases where consumers and utility have no difficulty arriving at a meeting of the minds on an allowance for losses in those cases.

The Court: Now, I am wondering how can the fact of losses in transmission possibly be relevant here?

Mr. Cottis: Mr. Rader in his opening statement, Your Honor, made some point of the fact that here the City had to put in a service drop to each of these buildings and they had all that expense, and, therefore, it was proper to treat each building as a separate establishment. Now, I am endeavoring to bring out from this witness that true there is some little expense in putting in that separate service drop which would not be involved if the consumer owned the service drop, and that the expense in the line loss and transformer loss which under the setup on Government Hill is borne by the supplier and possibly in all fairness should be borne by the consumer.

The Court: When you speak of supplier, you mean the City? [243]

Mr. Cottis: Yes.

The Court: Well, since it has already been testified to that it is not susceptible of measurement then what is the use of talking about it?

Mr. Cottis: I offer to prove by this witness, Your

(Testimony of Robert W. Retherford.)

Honor, that a practical measurement that is reasonably accurate of the amount of that loss, namely, something less than 5 per cent in connection with these buildings, is the standard.

The Court: Well, you say it is standard. Where?

Mr. Cottis: For this situation.

The Court: But evidently the supplier of current here, and perhaps elsewhere, because of difficulties of measurement doesn't resort to that and he prefers some other way of, you might say, recouping losses, so it seems to me we are getting nowhere in proving that there are losses in transmission and that those losses bear some different relation to other expense of this drop than has been assumed or stated here. I don't see where we are getting anywhere.

Mr. Cottis: I am offering to show Your Honor that in this particular installation those losses amount to less than 5 per cent of the metered house current.

The Court: I understand that, but after you have shown that then how do you apply it?

Mr. Cottis: It is in connection with the granting of the most favorable rate to the consumer. [244]

The Court: Well, that is what I want to know, how it would be pertinent in determining or granting this so-called most favorable rate. How would you apply that fact to it?

Mr. Cottis: Well, Your Honor, if that loss, say, were 100 per cent it might be that the City already has given us the most favorable rate. In other words, by metering us separately at each building and

(Testimony of Robert W. Retherford.)

charging us on a sliding scale for that building they may have given us the most favorable rate. I want to show that they have not because the loss would not be 100 per cent; it would be less than 5 per cent.

The Court: Well, proceed.

Q. (By Mr. Cottis): Mr. Retherford, what in your opinion would be the maximum line and transformer loss at these establishments?

A. Well, in this particular case with the arrangement involved there I feel that it would be less than 5 per cent of the metered amount of energy delivered to the house portion.

Q. Mr. Retherford, will you assume that at the inception of construction of these establishments the City had informed the owner that if they metered each building individually they would be charged for each building as an individual customer. In other words, just the contrary of the plaintiffs contention. With that assumption what could the owner of the establishment have done, if anything, to provide a physical point of single entrance for the City? [245]

A. Well, they could have inter-connected the buildings with their own installation providing a single point of delivery for the owner's own circuits in all these buildings. They could have inter-connected it.

Q. Do you have an opinion as to whether that would have been more or less expensive than the present system?

(Testimony of Robert W. Retherford.)

A. Well, I am sure it would have been more expensive than the present system.

Q. Could this inter-connection of house circuits be accomplished today?

A. Yes, it could still be done, but again it would be more expensive than if it had been done at the original—during the original construction period.

Q. Can you tell us what it would have cost back in 1949 or 1950 to provide a single point for delivery of service?

A. Well, to give you an estimate that is very good it would require quite a little study.

Q. In other words, it would not be possible for you to do that?

A. I could make an awfully rough one, but that is—I think perhaps to show you what might have went on in the minds of the architects, if they were faced with this problem, is that if the alternates were available as I have described, 1, 2, and 3, primary, secondary or the totalizing, they would find that the totalizing arrangement was definitely the most economical and would have been the one chosen. [246]

Q. When you say totalizing, are you referring to tele-metering?

A. No. Totalizing could be done by tele-meter, but that is a technical term that may imply some other things. Totalizing would be done merely by sending a signal from each meter in the individual buildings to a master meter which simply records

(Testimony of Robert W. Retherford.)

the total mathematically. It is a sort of adding machine of kilowatt hours and would save the trouble of adding them up arithmetically each month.

Q. How much cost would be involved in that method of applying a single meter?

A. Well, that cost would not be terrific. I would say probably less than \$2,000.00 for the type of project there.

Q. And the alternative under the present setup is to simply use an adding machine on the house meters?

A. Yes. That system of simply adding meter readings is done by utilities where it is impractical for one reason or another to install a single meter even though the consumer is treated as a single customer. There are cases and, as a matter of fact, I have some recollection that the old City Ordinance 55 has a provision to do that very thing. Do you have a copy of that?

Q. I hand you a photostatic copy of Exhibit I, which is entitled "Ordinance 55." Can you tell us the provision to which you refer?

A. Yes. If I be permitted to read I will just read this Section 24 [247] that has to do with this combining—"For the purpose of making charges all meters upon the consumer's premises shall be considered separately and the readings thereof shall not be combined, except that where the City shall, for operating convenience, install upon the consumer's premises, in place of one meter, two or more

(Testimony of Robert W. Retherford.)

meters, then the readings of such two or more meters shall be combined for the purpose of making charges."

Q. From your observation of the two establishments with which we are concerned here is this such a case that it is more practical—in other words, to have done it the way it was done?

A. Yes. I would say on the basis of your testimony that the consumer was to be treated as one commercial installation; that for the operating convenience of the City it would certainly have been practical to do it this way, just the way it is arranged on the Hill there now.

Q. Now, if the City had informed the plaintiffs otherwise—will you make this assumption—that the establishments would have saved \$10,000.00 per year in comparison with what they have been charged by the City for house electricity. With that assumption would it have been economically feasible assuming, as I say, the City said, "No, you are going to get billed separately for each building," would it have been economically feasible for them to go to one of these more [248] expensive of these 3 methods you outlined?

A. If your saving was \$10,000.00 I think there is one of those methods that could have been used that would have been more economical than paying that \$10,000.00.

Q. Which of the methods would that be?

A. Probably the primary metering system.

Q. Is it possible that the other methods would

(Testimony of Robert W. Retherford.)

have been economically feasible in view of the hypothetical saving of \$10,000.00 a year?

A. When I mentioned the use of the primary metering system I was assuming you had implied it would not be allowed to totalize. Then the other one I mentioned was secondary metering and I suspect that would be somewhat more expensive than the primary metering installation.

Q. With the \$10,000.00 per year saving in mind tell me whether that would have been economically feasible, the secondary metering?

A. Well, one analysis that has been made, which I have seen, indicates that quite a considerable saving is possible on primary, so possibly even a secondary system might have represented a saving, although not as much.

Q. Now, the analysis to which you refer concerning primary metering, is that the analysis given by Mr. McKinley in his letter?

A. I think perhaps that is the letter I saw. [249]

Q. I show you Exhibit No. 4 and ask you if this is the analysis to which you refer?

A. Yes. Yes, this is the one that I was thinking about.

Q. And part of that analysis, is it your testimony, indicates a very substantial saving through the use of primary metering?

A. Yes, it does. I have not had occasion to check all their figures but I see no reason to disagree with the procedure they used basically in making these calculations. That was their conclusion I believe.

Mr. Cottis: No further questions.

(Testimony of Robert W. Retherford.)

Cross-Examination

By Mr. Rader:

Q. Mr. Retherford, the primary metering method—who owns the transmission lines between the primary meter and the house connection where it is consumed?

A. Well, now are you talking about some particular case?

Q. Well, when you use primary metering?

A. You mean, typical primary metering installation?

Q. Yes.

A. Normally you probably find that the ownership of the facility beyond the meter was the consumer's.

Q. Which in this case would have been the housing project? [250]

A. That is right.

Q. Now, in the case we are talking about here, assuming that the City of Anchorage ran a line to the substation, as you pointed out on the map, is it a reasonable statement to say that the City has around \$60,000.00 worth of investments there?

A. You mean in those distribution facilities?

Q. In the distribution facilities.

A. I believe that figure was outlined in this letter. Yes, that sounds reasonable.

Q. But with a general primary metering setup those facilities would be owned by the consumer?

A. I would say perhaps a portion of those would

(Testimony of Robert W. Retherford.)

if the consumer was the consumer in total. Now, remember in this case there is a lot of tenants involved here too.

Q. Yes, I appreciate that. In other words, in this case the City would probably continue to own its own lines because it has to serve the tenants?

A. That is one way.

Q. Another way would be for the consumer to own the whole thing and another way would be if the City owns the lines for the consumer to rent from the City? A. Yes.

Q. Have a primary meter, pay a primary meter rate and then rent the lines? A. Yes. [251]

Q. Now, you are familiar enough with rate schedules so that you know that a lot of times a primary meter rate is different than a rate that is not primary metered? A. That is right.

Q. That sometimes there is a distinction?

A. Yes.

Q. Consequently, when utility companies have primary meters they very frequently change their rates and don't apply the rate that existed, therefore, making a special classification on primary meters?

A. That is correct because the consumer consumes more of the losses by so taking his service.

Q. So in the present case if there had been primary metering and they had granted primary metering to these people up here it is very probable that the immediate results would have been a rate change to allow for that. Isn't that correct?

(Testimony of Robert W. Retherford.)

A. I would say if they set it up originally on primary metering on the basis that the project would serve the entire load that the City would not serve the tenants—your primary rate would certainly be different.

Q. Well, but assume that the City insists on serving the tenants?

A. Well, of course, you are outlining a situation where you get into a great deal of bookkeeping—

Q. You get into—excuse me. Go ahead.

A. —which means that you would have a little difficulty in [252] classifying what might be considered as a primary rate, what might be considered as a residential rate. It is merely a device whereby you separate the tenants from the project. Primary metering in that case would appear to me to be a device whereby you separate the tenants from the project. You take the tenants meter readings and subtract it from the primary meter reading and the difference is losses and what is used by the project.

Q. Then there would be quite a lot of bookkeeping involved?

A. There would be some bookkeeping. There is no doubt about it.

Q. What would that bookkeeping involve?

A. Well, you would have to make an analysis of the system and the usage of the consumers to determine what portion of it might be chargeable to the house.

Q. Now, let's just take that point and we will

(Testimony of Robert W. Retherford.)

if the consumer was the consumer in total. Now, remember in this case there is a lot of tenants involved here too.

Q. Yes, I appreciate that. In other words, in this case the City would probably continue to own its own lines because it has to serve the tenants?

A. That is one way.

Q. Another way would be for the consumer to own the whole thing and another way would be if the City owns the lines for the consumer to rent from the City? A. Yes.

Q. Have a primary meter, pay a primary meter rate and then rent the lines? A. Yes. [251]

Q. Now, you are familiar enough with rate schedules so that you know that a lot of times a primary meter rate is different than a rate that is not primary metered? A. That is right.

Q. That sometimes there is a distinction?

A. Yes.

Q. Consequently, when utility companies have primary meters they very frequently change their rates and don't apply the rate that existed, therefore, making a special classification on primary meters?

A. That is correct because the consumer consumes more of the losses by so taking his service.

Q. So in the present case if there had been primary metering and they had granted primary metering to these people up here it is very probable that the immediate results would have been a rate change to allow for that. Isn't that correct?

(Testimony of Robert W. Retherford.)

A. I would say if they set it up originally on primary metering on the basis that the project would serve the entire load that the City would not serve the tenants—your primary rate would certainly be different.

Q. Well, but assume that the City insists on serving the tenants?

A. Well, of course, you are outlining a situation where you get into a great deal of bookkeeping——

Q. You get into—excuse me. Go ahead.

A. ——which means that you would have a little difficulty in [252] classifying what might be considered as a primary rate, what might be considered as a residential rate. It is merely a device whereby you separate the tenants from the project. Primary metering in that case would appear to me to be a device whereby you separate the tenants from the project. You take the tenants meter readings and subtract it from the primary meter reading and the difference is losses and what is used by the project.

Q. Then there would be quite a lot of bookkeeping involved?

A. There would be some bookkeeping. There is no doubt about it.

Q. What would that bookkeeping involve?

A. Well, you would have to make an analysis of the system and the usage of the consumers to determine what portion of it might be chargeable to the house.

Q. Now, let's just take that point and we will

(Testimony of Robert W. Retherford.)

go on to the next one in just a minute. When you make an analysis of the system what do you have to do then to do that?

A. Well, you generally take the inventory, the work orders that were used when you built the system, and you have a pretty good idea of what it cost you to build it. You can take some of the meter readings you have available and determine how the use of that system is shared between the project owner and the tenants, and on that basis arrive at a reasonable proportion of use for those facilities.

Q. Figuring it as now in the instant case, would you consider a [253] house meter just like an apartment meter when you consider the proportionate share of the burden on the system?

A. Well, the house meter in this case is a device to determine the share. It would not necessarily even be read after you once set this up.

Q. Then you have quite a problem in setting it up. Would you, in setting it up, compute a house meter as having the same rate as an apartment meter?

A. Well, it wouldn't be necessary to install the house meter in this case.

Q. I know. Well, let's say we want to put in primary metering now. Then would you give it the same rate?

A. How do you mean the same rate, John?

Q. Well, what I am trying to get at, Mr. Retherford, is, you have to go through this rate analysis

(Testimony of Robert W. Retherford.)

to compute how much you should charge to the house for the cost of installation and maintenance of that system. A. Yes.

Q. Now, how do you rate the house on kilowatt hours—excuse me. Go ahead.

A. No, I wouldn't rate it strictly on kilowatt hours usage basis because you have two different classes of consumers, your tenants is one class, the house is another class. If you give that classification due consideration then you can make a logical split of usage of facilities. [254]

Q. Well, how do you rate it? Do you consider—

A. You can rate it on the basis of demand. Demand would enter into the picture.

Q. Consumption?

A. Yes. I have gone through quite a few of these calculations.

Q. Yes, they are complicated, aren't they?

A. They are.

Q. Very complicated? A. Yes.

Q. Now, if the City adopted a method of primary metering, every time we went out and primary metered we would have to go through those same calculations for a particular project?

A. You would have to make the basic calculations once, that is right.

Q. So when you talked about whether or not you could effectuate a savings by primary metering, assuming that \$10,000.00 a year would be the difference, I think you just testified a few minutes ago

(Testimony of Robert W. Retherford.)

that probably you would set up a special primary metering rate if you had primary metering, wouldn't you?

A. Ordinarily there is a difference in rate established for primary metering.

Q. Now, there is nothing that says that rate wouldn't more than wipe out your profits from primary metering?

A. On the other hand the rate that is normally set up for primary metering is usually lower. You stand to gain, John. [255]

Q. I understand that it would usually be lower, but it doesn't necessarily have to be lower?

A. No, it doesn't have to be.

Q. So the City Council could have raised the rate over here?

A. Well, they might have become subject to being called discriminatory if they did.

Q. Well, they are only discriminating against people with primary meters, no one else. They are treating everybody with primary meters the same way, aren't they?

A. I think if you got into that it wouldn't be a case of metering. It would be a case of delivery of electricity to people. It isn't too closely tied in with the way you meter it. When you start talking about metering it is what you wind up with in dollars that you are getting.

Q. You are familiar with a lot of companies who would not permit primary metering under the circumstances we have up here, aren't you? Some of

(Testimony of Robert W. Retherford.)

them would and some of them wouldn't, isn't that a fact?

A. I expect you can find them on both sides. Most of the utilities I have had connections with would consider a proposition for primary metering. I mean, they would naturally protect themselves from losses of investments and so forth, but they would consider such a proposition.

Q. There would be some that would have a rule, probably, to the effect that they didn't have any primary metering? [256]

A. I have known of no such case in my experience.

Q. That don't insist they don't have primary metering? A. Yes.

Q. Would you say the City of Anchorage is unique, in all the system with which you are familiar with, in that we don't have primary metering?

A. No, I wouldn't say that. I think you have some installations, as a matter of fact, that would be classed as primary metering—whether or not they are labeled that way. In engineering sense they would be classed as primary metering.

Q. We have some primary metering?

A. Yes, I would say you do.

Q. In which instances would those be?

A. I am thinking of International Airport in this particular case.

(Testimony of Robert W. Retherford.)

Q. International Airport is where the City supplies through one point of delivery to C.A.A. which operates the International Airport, is that right?

A. That is right.

Q. A Governmental agency? A. Yes.

Q. Now, speaking other than that, do we have any other primary metering that you are familiar with?

A. Well, let me see. You have primary metering, of course, between the City and its neighboring utilities. For example, [257] the City and Chugach Electric Association, and you have primary metering between them, and between you and the Army and I think you have had it between the City and The Alaska Railroad.

Q. That could be. The Alaska Railroad is an agency of the Federal Government?

A. Yes, I believe they are under the Department of the Interior.

Q. Do you know of any other primary metering?

A. I am not quite that familiar with the City system. That is all I can recall right now.

Q. On primary metering you can work out a situation, as you said in one instance would be where the consumer owned the distribution system beyond the meter, is that correct?

A. That would be one system, yes.

Q. Another system would be where, if we applied it to Richardson Vista and Panoramic View, the consumer owned the facilities and leased them to the City for the City to supply the apartment house

(Testimony of Robert W. Retherford.)

owner? A. Well, that would be a possibility.

Q. That is a possibility? A. Yes.

Q. The third possibility would be for the City to own the system and lease it to Panoramic View?

A. That is a possibility.

Q. Then on each of those possibilities the maintenance obligation, the public liability for faulty work, it could be on [258] the consumer?

A. If that was the arrangement.

Q. The City would assume the public liability, or the public liability system if they owned it?

A. That is correct.

Q. It has an indefinite number of variations, does it not? A. That is correct.

Q. Mr. Retherford, assuming for purposes of discussion here that that system is worth \$60,000.00 as an electrical distribution system. Most rate structures are set up so that the facilities generally will pay for and the structures revenues will pay for the system, whatever it is?

A. That is correct.

Q. And generally speaking in rate structure you don't pick six or eight blocks and consider that as an individual unit, do you?

A. Well, I wouldn't say it that way. Utilities design rate schedules. It has come about over many, many years of experience and rate schedules today have a pattern of classification that is pretty well apparent throughout the country where electricity is used. There are exceptions, of course, and these patterns of classification simply set up, not a condition

(Testimony of Robert W. Retherford.)

Q. International Airport is where the City supplies through one point of delivery to C.A.A. which operates the International Airport, is that right?

A. That is right.

Q. A Governmental agency? A. Yes.

Q. Now, speaking other than that, do we have any other primary metering that you are familiar with?

A. Well, let me see. You have primary metering, of course, between the City and its neighboring utilities. For example, [257] the City and Chugach Electric Association, and you have primary metering between them, and between you and the Army and I think you have had it between the City and The Alaska Railroad.

Q. That could be. The Alaska Railroad is an agency of the Federal Government?

A. Yes, I believe they are under the Department of the Interior.

Q. Do you know of any other primary metering?

A. I am not quite that familiar with the City system. That is all I can recall right now.

Q. On primary metering you can work out a situation, as you said in one instance would be where the consumer owned the distribution system beyond the meter, is that correct?

A. That would be one system, yes.

Q. Another system would be where, if we applied it to Richardson Vista and Panoramic View, the consumer owned the facilities and leased them to the City for the City to supply the apartment house

(Testimony of Robert W. Retherford.)

owner? A. Well, that would be a possibility.

Q. That is a possibility? A. Yes.

Q. The third possibility would be for the City to own the system and lease it to Panoramic View?

A. That is a possibility.

Q. Then on each of those possibilities the maintenance obligation, the public liability for faulty work, it could be on [258] the consumer?

A. If that was the arrangement.

Q. The City would assume the public liability, or the public liability system if they owned it?

A. That is correct.

Q. It has an indefinite number of variations, does it not? A. That is correct.

Q. Mr. Retherford, assuming for purposes of discussion here that that system is worth \$60,000.00 as an electrical distribution system. Most rate structures are set up so that the facilities generally will pay for and the structures revenues will pay for the system, whatever it is?

A. That is correct.

Q. And generally speaking in rate structure you don't pick six or eight blocks and consider that as an individual unit, do you?

A. Well, I wouldn't say it that way. Utilities design rate schedules. It has come about over many, many years of experience and rate schedules today have a pattern of classification that is pretty well apparent throughout the country where electricity is used. There are exceptions, of course, and these patterns of classification simply set up, not a condition

(Testimony of Robert W. Retherford.)

for a particular project, but they set a pattern which can be applied to a particular load. They define a particular type of a load. If the consumer wishes to bring [259] his load classification with the realm of the particular rate schedule the utilities generally will give him that rate schedule.

The Court: I think we will adjourn at this time.

Mr. Rader: Does Your Honor anticipate going ahead with this case in the morning?

The Court: No.

Mr. Hellenthal: Your Honor, you will recall there were discussions on two occasions last week of going through until noon on Saturday and I believe Your Honor said we would go through until noon on Saturday. I believe the first one was last Friday and then again at the last——

The Court: I might have mentioned it in connection with my doubts about the estimates counsel made as to how long this case would take, but I have decided to quit driving myself.

Mr. Hellenthal: Could I impose on you further. Two of our witnesses, Mr. Sarno, is leaving tonight for New York City and he could be here tomorrow if there were need for him to stay. Our second witness, Mrs. Hall, desires to return tomorrow to Seattle and we should like to have permission to allow these witnesses to go back to their places of residence.

The Court: If counsel for the defense wants them he should state so.

Mr. Rader: I will excuse them.

Testimony of Robert W. Retherford.)

Mr. Hellenthal: Thank you very much, Your Honor. [260]

The Court: Adjourn until Monday morning at 10:00 o'clock.

(Whereupon, at 5:41 o'clock p.m., Court was adjourned to Monday morning, March 28, 1955, at the hour of 10:00 o'clock a.m.) [261]

Mr. Rader: If it please the Court, I have a few cases that I have briefed—I can hardly call it a brief, but it is a memorandum, at least, of authorities and I have served copies on other counsel. I believe they all have them.

The Court: Did we conclude with the witness at the time of adjournment?

Mr. Rader: I don't believe so, Your Honor.

ROBERT W. RETHERFORD

resumes the stand and testifies as follows on

Cross-Examination

(Continuing)

By Mr. Rader:

Q. Mr. Retherford, you are the same Mr. Retherford who testified previously? A. Yes, sir.

Q. Mr. Retherford, the other day when we were discussing primary metering and the different methods of accomplishing the same, would it be a fair statement to say that primary metering and the rates for rental of properties and maintenance costs and that type of thing are largely a matter of negotiations between the consumer and the utility?

(Testimony of Robert W. Retherford.)

A. You mean the application of primary metering in determining a different rate or something than what it would be otherwise? [263]

Q. No. What I am referring to is assuming that the utility company owns the distribution facilities, as in the present case, and assumes further that the consumer wants to have primary metering and deduct the consumption of the individual tenants from that primary metering, then you would have to negotiate as to a reasonable rental for the use of the City's distribution system? A. Yes.

Q. That would be a matter of negotiation?

A. Yes, I think so.

Q. You would have to figure out a rate for amortization of your facilities?

A. It would be a matter of arriving at a meeting of the minds on how they wanted to approach that, yes.

Q. Mr. Retherford, I am handing you Plaintiff's Exhibit No. 4, I believe you are generally familiar with that letter? A. Yes, I am.

Q. Directing your attention to that paragraph which says, "A complete inventory and appraisal of the existing facilities used in serving these buildings was made, and estimates of the cost of rerouting the circuits so all buildings could be metered at one point were made." Directing your attention to that paragraph, what would be a reasonable fee on a contract basis for making an inventory of those facilities, let's say, of Panoramic View and of preparing the engineering [264] necessary for rerouting of lines? A. Well—

(Testimony of Robert W. Retherford.)

Q. Let me put it this way: Would you say \$1,000.00 would be an unreasonable fee for those services?

A. Well, not necessarily. Let me state this, that in the construction of such facilities there have surely been records kept and work orders and so forth involved in that construction and it would appear to me, unless there was some disagreement between the parties, that they would be willing to take the records of the construction as it was built without going into a special engineering study.

Q. Well, assuming that those records were not adequate and you had to make an appraisal of the existing facilities and an inventory of the existing facilities and also do the engineering for rerouting for, say, Panoramic View, would \$1,000.00 be an unreasonable fee for doing that?

A. Well, let's see. Give me a minute here to do that.

Q. Certainly. Take all the time you wish.

Mr. Reischling: If the Court please, I object to the form of this cross-examination as not material or relevant. It assumes matters that are not in evidence. There has been no testimony that the records covering the installation of these particular facilities the City has are inadequate and he is asking this witness to assume something on the basis of another [265] assumption.

The Court: I think it is permissible on cross-examination of an expert after he has testified. Objection overruled.

(Testimony of Robert W. Retherford.)

A. Well, let's see. On the basis of your question then, Mr. Rader, assuming the value of these lines is somewhere near as indicated in this letter and that it was found necessary to make an engineering appraisal apart from the records that were already in existence this \$1,000,000 you mentioned is probably somewhere in the vicinity of what it would require. There might be special conditions and so forth, but then that is somewhere near the magnitude of what it would be, I would say.

Q. Does that include what you call a nut and bolt inventory?

A. Well, it might. There again you have considerable variables. If there are standard patterns of construction in existence, why, the use of standards makes your inventory much easier to do. You can inventory it on the unit assembly basis where your nut and bolt inventory is automatic.

Q. Now, assuming that you use those standards, there would again be a lot of room for argument between a consumer and the utility company if you used an average or standard instead of an actual nut and bolt inventory, detailed inventory?

A. Well, yes. There is the margin of accuracies in any of these types of negotiations. It is something that anybody [266] could argue down to as fine a point as you felt it was worthwhile arguing about. You can get into it where you can argue about the length of the bolts, if you wish, and go and measure every bolt, but that isn't a general procedure and it is usually possible to arrive at an agreement on the

(Testimony of Robert W. Retherford.)

value of the system without spending an unusual amount of money for engineering purposes.

Q. If you had to go into it too far it would be impossible—it would become unreasonable and make it an impossibility?

A. Certainly.

Q. Which is not generally required?

A. No.

Q. Mr. Retherford, directing your attention again to that letter, do you see anything in that letter which allows for administrative costs?

A. Well, let me review it.

Mr. Reischling: If the Court please, I object on the basis the letter speaks for itself.

The Court: Well, that is true of all exhibits except that counsel has a right to call attention to some particular part of the exhibit in order to lay a foundation for the succeeding question. I assume this is what he intends to do, otherwise it would be useless and senseless to ask the witness to merely repeat something that is already in the document.

A. On administrative costs, you mean what the administrative [267] costs would be in connection with electrical service or in connection with the construction of this system?

Q. Construction of the system—well, the administrative costs and construction of the system would probably be included in a valuation of the system of facilities, would it not?

A. I would think so.

Q. In the \$60,000.00 figure?

(Testimony of Robert W. Retherford.)

A. That is right.

Q. How about in the operation of the system?

A. Well——

Q. Maintenance, upkeep?

A. I see nothing in these figures here showing a breakdown of the value of the portion of the system that might be used by the project that would include administrative costs, however, it occurs to me in the furnishing of electrical service that is normally covered in the rate itself, the administrative costs is one of the things that is ordinarily covered in the rate unless you are referring to some special administrative cost that is not normal in the furnishing of electrical service.

Q. Well, now assuming that we rented a part of the existing City facilities to the consumer. Wouldn't there be an additional administrative cost involved in that?

A. Well, you might say there would be. I would say in this [268] case it would be very slight because the majority of the work would come in the original negotiations. When there was some agreement arrived at between the project and the City, we will say, which would determine exactly what portion the City was going to lease or rent—I mean, the project was going to lease or rent and from that time on it would be merely a basis of calculation of simple percentage which might only be done once.

Q. That letter, I think you testified previously, does not include line losses and transformer losses?

A. I don't think that is covered here. That is correct.

(Testimony of Robert W. Retherford.)

Q. Mr. Retherford, it would be a fact, would it not, that the most economical way for a utility company to supply a consumer would be through a single connection and single point of delivery?

A. You mean from the standpoint of utility?

Q. From the standpoint of the utility, pure and simple.

A. If you are going to serve one consumer you try to make it as simple as possible and one connection is certainly about as simple as you can make it.

Q. Well, you would go further, wouldn't you, and say that single point delivery from the utility's viewpoint is the simplest and easiest and the cleanest way to handle something?

A. Well—— [269]

Q. Delivery to a customer?

A. Yes, I guess you could make that statement. There are cases where it would conceivably be to the utility's advantage to have more than one point. It depends on the—well, for example, I can see where you might have a utility system pretty much in existence, and a load would come along, the utility system is such that they might be required to rebuild or add a little bit to their own system in order to be able to serve that consumer at one point, whereas, if they took two they might be able to use their existing facilities. There are cases of that kind that could happen, however, as you state, if you start from scratch the simple way is probably one point.

(Testimony of Robert W. Retherford.)

Q. Now, assuming, Mr. Retherford, that there were 17 points of delivery on a tract covering 23 acres and assuming that there were no other customers on that tract, the simplest and easiest thing for the utility company to do, if they could, would be give one point delivery some place on the tract. Is that correct? A. Yes, I think so. Yes.

Q. Mr. Retherford, I am handing you Exhibits A & B. Have you ever seen those before?

A. I am afraid I haven't seen them this close before. I saw them presented in Court, but I have not looked them over very carefully. [270]

Q. Let me take one of them. In the lefthand column is a building number, then it has kilowatt hours—following from left to right—then the amount billed for that particular building. Looking at those generally so that you have an idea of the power load for each individual building as a general average. A. Yes.

Q. Assuming that the 17 points of delivery, that I previously mentioned, on a tract of 23 acres were disbursed as indicated on Exhibit H over the tract and that there were no other consumers on that tract, what would be the cost of installing a distribution system adequate to handle that tract and all the consumption?

A. You mean the consumers in these buildings too?

Q. No. Assume only that the 17 consumers are the only consumers and consume the amount as indicated on Exhibits A and B generally. In other

(Testimony of Robert W. Retherford.)

words, taking the tenants off that land—we are taking all the renters off the land, off the project and the only thing we are going to do is build a distribution system to serve the house meters.

Mr. Reischling: If the Court please, I object to this. This is just highly speculative. This entire system was not built for the hallways of Panoramic View. It was built and designed and constructed up there to serve 682 families. Now, it is the height of being ridiculous to say how much would it [271] cost to bring power to 14 buildings of Panoramic View for the purpose of lighting hallways and furnishing power for a laundry for which there would be no tenants and furnishing the power for pumps to pump steam through the buildings for no tenants. I mean, I think counsel's question here, when he says how much would it cost to put in a system to do what Panoramic View does not do, is absurd. This entire plant or plants was developed and constructed to serve the people that use the power. The incidental use that the buildings use is nothing but incidental to the general use that is necessary for the tenants that live on the Hill. After all, we are not trying a rate case or establishing a rate or anything of that kind. We are merely talking about billing here and the City never did contemplate building a plant out there, or plants out there, nor did we, nor does anyone, to light hallways for non-existent tenants.

The Court: There is no reason why a question cannot be broken down, why you couldn't eliminate

(Testimony of Robert W. Retherford.)

the ultimate consumer, if the question is not otherwise objectionable. The objection will have to be overruled on that ground.

Q. (By Mr. Rader): Could you give us a rough estimate? I understand it will be rough.

A. It will be rough, all right. These buildings are all single phase. The loads individually aren't great. You could eliminate, of course, a considerable amount of heavy [272] construction that is there now and if you assume that the City would supply the power to some central point where there would be one delivery, the project would distribute it to their buildings from that point.

Q. Now, Mr. Retherford, assuming that no facilities existed and you had to build a distribution line and a distribution system to serve those 17 points distributed over 23 acres and the system were a capacity adequate to serve power as indicated by Exhibits A and B to those points individually—

A. Let me make sure I am clear on this. In the first place if you had a group of such buildings, let's say, they are individual homes, for example, now instead of these I am assuming that the utility involved would build their lines to some load center where they would make this point of connection.

Q. That is correct.

A. And that the remainder of the system in this case would be furnished by the project.

Q. That is right, and that there is no existing system there prior to that?

A. If you assume the City comes to that load

(Testimony of Robert W. Retherford.)

center I would say that those 19 buildings could probably be connected for something on the order of \$200.00 or \$300.00 apiece.

Q. Does that include putting in poles?

A. That is right, yes. I can show you installations in the [273] Anchorage area that have been put up for that price where this type of service might be involved.

Q. Is it your testimony, Mr. Retherford, then that you could build a distribution system that extended over 23 acres to 17 different points of delivery that would include poles, wire, transformers and everything for a total of \$3,500.00?

A. On that order, yes, sir. That is beginning from your load center and supplying the rest of the system. Would you like a little more detail on that?

Q. Yes. Would you go ahead?

A. This particular one I hold here is Richardson Vista. I think if you look at the map you can count the poles. I am not sure there is that much detail in there. There aren't very many poles involved and the number of transformers necessary to serve these buildings alone would be quite small, so I think if you checked the actual investment necessary for that alone it is quite small in comparison to what you have there now. I can produce some figures on similar installations if you would be interested.

Q. What do you mean by a load center? Perhaps that is where we are getting—

(Testimony of Robert W. Retherford.)

A. Well, in the case of Richardson Vista, just looking at it from the practical standpoint there, the arrangement of those buildings, perhaps your load center would be at one [274] end of the project. In that case, which is—well, you know the way it goes there—now there is one line that runs through there, pretty much through the center and between two rows of buildings through the project and what I am visualizing is simply that one line, the service drops to the buildings with perhaps your connection point at one extremity of the project.

Q. Would that be approximately the same cost for Panoramic View?

A. Well, Panoramic has a couple of buildings sitting off on one side, as I recall. The rest of it is very similar. It might be a little bit more in that case, but still on that order, say, \$5,000.00 or something in that vicinity. I am assuming that the primary metering also in this case would be supplied by the City. It is customary for the Utility to supply the metering.

Q. And supply the connection? A. Yes.

Q. Now, could you give us any estimate as to what it would cost for the consumer to maintain those facilities in this case? Take the Panoramic View Corporation.

A. Well, that could be quite a variable proposition. In cases of that kind the probability is if the project makes such an arrangement they would make a proposition to somebody in the utility busi-

(Testimony of Robert W. Retherford.)

ness to take care of that little chunk of line for them at some figure. [275]

Q. They would negotiate probably a service contract with someone? A. Probably.

Q. If they had to do it themselves they would have to outfit themselves with all the equipment necessary to maintain public utility lines which would be prohibitive?

A. Ordinarily unless they had quite a bit of that type of work they were doing they wouldn't attempt it.

Mr. Rader: I believe that is all.

Redirect Examination

By Mr. Reischling:

Q. Mr. Retherford, isn't it a fact that when a basic rate for the cost of power is made by the Utility, it is taken into consideration in determining what that rate is the capital investment for all the facilities as one item? Isn't that correct?

Mr. Rader: If it please the court, I——

Q. Together with line loss and transformer loss and all the factors that go into making up the cost of the power to the Utility?

A. Yes, that is right.

Q. Plus a reasonable profit on top of that, is that not so? [276]

A. Yes, that is, the utilities that are supplied by the Utility. I mean, the installation that is supplied by the Utility.

(Testimony of Robert W. Retherford.)

Q. And when a rate is published by the Utility at which they agree to furnish power or current to the consumer that rate comprehends all of the costs to the Utility of the installation, of distributing the current to the ultimate consumer, plus a profit. Is that not so? A. Yes.

Mr. Rader: If the court please, I wish to object to the question first as being leading to an extraordinary degree and, secondly, that Mr. Retherford, I believe, in his qualifications was not qualified as a rate expert.

The Court: Well, it just seems to me that these matters are common knowledge. I don't even know why it is necessary to ask that question. Everybody knows in the figuring of the rates of utilities such factors as the one mentioned have to be taken into consideration, otherwise, you would never know whether you were going to make a profit or not by trial and error.

Q. (By Mr. Reischling): Mr. Retherford, when you talk about a single point service, that is actually what exists in each one of the 14 buildings of Panoramic View and the 19 in Richardson Vista, is that not so, presently today?

A. Yes, I think there is one service entrance to those buildings. [277]

Q. In each one? A. Yes.

The Court: Did you say to each of the buildings or to each of these two groups?

A. To each of the buildings. As it exists now

(Testimony of Robert W. Retherford.)

the utilities are owned by the City and the service drops go to each building.

Q. Now, the drop that goes to the building itself—that is, for the use of Panoramic View in its hallways that I am talking about now, the power that we are discussing in this case—if that one meter was eliminated would there be any lesser installation in each one of those buildings than there is right now other than that particular meter?

A. You mean would there be any lesser requirements to the utility supplying the system?

Q. That is right, other than that one meter?

A. Well, I would say that the utility system as supplied by the City presently would be very little different than it is now if that house meter were eliminated—that house service were eliminated.

Q. In other words, there would still have to be 22 independent, individual services for each one of the 22 tenants in the 22-unit building and the same service for the tenants in the 16-unit buildings and the 12-unit buildings?

A. It would be the same as it is now minus the house meter, yes. [278]

The Court: Well, what would take the place of the eliminated meter?

A. Well, I assume he may be talking about a case where the tenants supply their own house services.

Q. If there were none of these, that is, if the tenants prorated the cost of the hall lights and what not and it was all on their own meters?

(Testimony of Robert W. Retherford.)

A. There are cases where that is done. I don't think it is particularly general, but there are cases where there is no house meter and any apartment service is apportioned to the tenants.

Q. Now, actually then all that one particular meter does is to total the amount of power that is consumed by the house generally, apart from that used by each individual tenant?

A. It measures the energy furnished the house in that particular building.

Q. Now, Mr. Retherford, it is a fact, is it not, that the only problem at issue here today is the measurement of current that is used by the individual buildings for each corporation? Is that not so?

Mr. Rader: If it please the court, I can't see how that would be a proper question, to say the only problem is the measurement of current. I don't see that his answer would be of any probative value to the court.

The Court: I thought the problem here was not one of [279] measurement, but one of the rate.

Mr. Reischling: It is not one of the rate, your Honor.

The Court: Isn't that what the complaint is, that they are not given the benefit of the proper rate?

Mr. Reischling: In order to determine, your Honor, what is the proper rate and according to the published tariffs of the Company we must first measure the quantity of power used for the purpose of applying the rate. Now, by its own tariffs the

(Testimony of Robert W. Retherford.)

Company says that if you use 10 kilowatts it will cost you 7c.

The Court: But we have the consumption here, as I understand it, over quite a period of time, so there is no question about that, so it still resolves itself, it seems to me, essentially on a determination of the proper rate.

Mr. Reischling: Can that be done, may I ask your Honor, without determining the quantity of power that is used?

The Court: I just called attention to the fact that these exhibits show the power consumed and I thought the parties agreed on that.

Q. (By Mr. Reischling): Now, you testified on cross-examination Friday, Mr. Retherford, with reference to Exhibit L. Are you familiar with the installation at the International Airport?

A. Generally.

Q. Now, there was an inference in counsel's question, or I believe a statement, when he was interrogating you that [280] that power was furnished to the Civil Aeronautics Authority; that is a government agency. Do you know the names of some of the users out there at International Airport to whom power is furnished through that delivery system that was installed by the City of Anchorage?

A. Yes, I think the—well, what you might call the ultimate consumers in many cases out there are private airlines, The Alaska Airlines, Pacific Northern, various offices in the building. Many of these

(Testimony of Robert W. Retherford.)

firms have their own buildings on the airport that are served through that connection.

Q. There are restaurant facilities out there, too, are there not, that is privately operated that obtain power from the same hookup?

A. Yes, I believe so.

Q. And that power is sold by the International Airport or the C.A.A. to those users?

A. It is my impression, yes. The C.A.A. resells, if you want to call it that, to these ultimate consumers.

Q. In other words, this particular government agency has been put into the utility business by the City of Anchorage and sold power with the permission to resell to other private users?

A. They are reselling to private users.

Q. Do you know if there are other similar installations of that character in this [281] community?

A. No, I can't be sure. I thought perhaps there was a similar condition at Merrill Field, but I am not certain.

Mr. Reischling: That is all.

Recross-Examination

By Mr. Rader:

Q. Mr. Retherford, International Airport is outside the City limits. I ask your Honor to take judicial notice of that.

The Court: The court can take judicial notice of it.

(Testimony of Robert W. Retherford.)

Mr. Rader: I assume counsel will stipulate it is on a Federal Reservation.

Mr. Reischling: If you say so, counsel. I don't know but if you say so I won't dispute what you say. I don't know and that is why I say if you say so.

Q. (By Mr. Rader): Mr. Retherford, that supplying International Airport was competitive bid, wasn't it? The City of Anchorage was bidding with another power utility in this area?

A. I think in the original case, when they first called for it, it was based on competition.

Q. Mr. Retherford, in that situation where the City supplies power we have what we call single point delivery, don't we?

A. That is correct. [282]

Q. And all the distribution lines beyond the single point of delivery are owned by the Federal Government or the C.A.A.?

A. Yes, I believe they are.

Q. And are maintained by that authority?

A. I think so.

Q. So they don't rent any of the City's facilities as such? A. Not that I know of.

Mr. Rader: That is all.

Re-redirect Examination

By Mr. Reischling:

Q. Mr. Retherford, how far out is the International Airport from the City? Do you know?

A. It must be about six miles, I guess.

(Testimony of Robert W. Retherford.)

Q. Do you know what the cost was of bringing the power from the City of Anchorage to the distribution point at International Airport, that is, to the point at which it was primary metered?

Mr. Rader: If it please the court, that is going considerably beyond the scope of the recross. Now, this whole matter actually was on redirect and it is beyond the scope of the cross. We had cross, redirect, recross and now we are going beyond the scope of the recross. I object to it for that purpose. [283]

The Court: Well, but if it is material or relevant it seems to me that it is within the scope of the redirect. Why wouldn't it be within the scope of the redirect? There was testimony here that it is beyond the City Limits and that the City furnishes service upon being awarded the bid on competition. Now I wonder whether an example of that kind can have any relevancy in the determination of the question before the court?

Mr. Rader: I don't think it does have any relevancy but we can keep on going on it.

The Court: In other words, unless it is beyond the City Limits then obviously the regulatory power, the City council's fixed rates does not touch it and I don't see how, other than for illustrative purposes, it becomes material to inquire into these matters.

Mr. Rader: I quite agree with your Honor.

Mr. Reischling: I don't understand your Honor's conclusion that the regulatory power of the City

(Testimony of Robert W. Retherford.)

does not touch it. This utility is owned by all the people of this City. The City gave power to International Airport. It could be enjoined from so doing because the cost of bringing power to the International Airport, unless it is producing that power, is a direct charge to each and every consumer within the City. Therefore, it is very material to show what it cost the City for bringing that particular power out to International Airport and the rate at which the City elected to sell it to them on this competitive [284] basis without any requirement, as the exhibit shows, as to the quantity of power they could use.

The Court: Of course, that is extreme and far fetched illustration to imagine the City would furnish power to somebody at below cost. If my recollection is correct it is that regulatory power of the City, as far as regulating rates to somebody outside the City, and certainly it just seems to me it would be governed by the same consideration that would apply in fixing a rate for consumers within the City.

Mr. Reischling: If your Honor please, in the published rates which is in the telephone book, the City does publish a rate for furnishing rural or persons outside the City, which is far greater than the rate for furnishing the power to urban inhabitants.

The Court: I say, it would have to be that.

Mr. Reischling: Well, but this particular rate, as the contract shows, at which the power was sold

(Testimony of Robert W. Retherford.)

to the International Airport is 2.8 cents per kilowatt on 282——

The Court: So what? I don't know these other facts you apparently have in your mind so I don't see the significance of that.

Mr. Reischling: Counsel went into the cost of this particular distribution system to Government Hill. The cost of bringing this line out there was in excess of \$200,000.00 which we offer to prove by this witness, to the International Airport alone without any requirement that the International Airport used any [285] particular quantity of power.

The Court: I am unable to follow your argument. You will have to elucidate if you want me to take cognizance of it.

Mr. Reischling: If the court please, we are asking here we be accorded the rate to which we are entitled on a declining scale because of the quantity of power.

The Court: I understand that, but what isn't clear to me is that you are now attempting to draw some comparison with something beyond the City limits.

Mr. Reischling: Very well. It is a discriminatory point. The City, in this one particular instance at least, has discriminated in selling power for resale to an instrumentality five miles away or six miles from the City at a rate less than they charge the people in the City and at a rate that is not published in the Published Rate Schedule and under the laws of Alaska they are required to publish

(Testimony of Robert W. Retherford.)

this rate schedule at which to fix the rate schedule and publish the rate schedule before that rate goes into effect.

The Court: I am inclined to think before the court can give any consideration to a case of that kind, from which the inference of discrimination could be drawn, it should be shown as a sort of foundation that there are no instances within the City itself that can be used for the purpose of comparison or for the purpose of showing discrimination. I don't know why we should go outside the City to show where the method of supplying [286] the conditions under which current is supplied are so different that it is difficult to make comparisons and draw an inference of discrimination. So it seems to me before the court can consider examples of that kind at which current furnished to a consumer outside the City limits is furnished at a rate which would warrant an inference of discrimination it should be shown that there are no cases that would warrant the drawing of such an inference of consumers within the City itself. As I say, it just simply would add too greatly to the difficulties of the court. Now, if there are no instances of that kind that can be pointed to within the City itself, then, of course, we may go outside of the City.

Mr. Reischling: We gave counsel the notice to produce other contracts. I believe he stated that there were some, but he didn't know which ones there are. Of course, we have no knowledge of the

(Testimony of Robert W. Retherford.)

particular contracts under which the City may have entered.

Mr. Rader: I think it should appear in the record that counsel went to the City offices and went to the City files and that they were exhibited the contracts.

Mr. Reischling: I wasn't there. I didn't know that.

Mr. Rader: They had the opportunity to examine all of them and bring any of them back they so desired or specify them in the subpoena and we will produce them.

Mr. Cottis: Your Honor, Mr. Hellenthal isn't here [287] today. Judge Hellenthal had a stroke last night so John left for Juneau unexpectedly this morning, but he and I did go over to the City Clerk's office and were given access to a file drawer that was labeled "Government Contracts." It was the day that we reconvened at 1:30 and it was during the lunch hour in the City Hall and we had possibly a half hour or 20 minutes or so there. I don't know what portion of the City records we saw. Mr. Hellenthal made the arrangements and, as I say, he is not here today, but we did look part of a file drawer called "Government Contracts."

The Court: It seems in this connection that there is another question that occurs to me and that is, suppose that the plaintiffs could show that the City acted discriminatorily in the rate at which it furnished power to the C.A.A. It seems to me that while that would be a legitimate complaint on the

(Testimony of Robert W. Retherford.)

part of all consumers within the City how could the plaintiffs in this case show that they were in a different position from that occupied by any other consumer in the City?

Mr. Reischling: The law is that if the corporation—that any consumer has the right to sue—any consumer who is discriminated again in this city has the right to raise that point in court.

The Court: I am not raising that point, but I say, how are you going to argue that a favorable rate—you might say, a preferential rate with the C.A.A. at the airport is proof of the fact that the rate at which current was supplied is discriminatory? [288]

The Court: The reason for that, as I see it, is that the same argument could be made on behalf of every consumer within the City. It seems to me that when we draw comparisons for the purpose of supporting the charge of discrimination that the comparison would have to be made with consumers in the same situation as the plaintiffs, that is, consumers within the City.

Mr. Rader: If it please the court, would your Honor like to hear some authorities as to the different classification of the International Airport; how it is irrelevant to this case, immaterial?

The Court: I am already arguing that now.

Mr. Rader: I have authorities.

The Court: I don't see the relevancy of it and am still of that opinion after hearing what has been said here, so it is not necessary to make an

(Testimony of Robert W. Retherford.)

argument about it yet. I have already indicated that there would have to be a showing made first that there was no other consumer within the City limits of which a comparison could be made and then, of course, the problem we would be up against, if we went to the International Airport, is to show that the conditions were such that an inference of discrimination or preferential treatment could be drawn and in view of the conditions under which current is supplied to these consumers outside the City on competitive bids, why, obviously, it would require a pretty clear showing, so far as the conditions [289] are concerned, before the court could make any kind of comparison or could make the inference of discrimination.

Mr. Rader: If it please the court, even assuming all of that were shown to your Honor, the law, I think, is rather clear and I would like to read your Honor a paragraph that the fact that a private consumer, a business consumer, has no right to insist upon equality with the Federal Government or its agencies in their consumption or in their service or anything else and the fact, if you do give the Federal Government a special rate, has no bearing on private discrimination cases. I have authorities to give to your Honor to that effect. Assuming they showed it was exorbitant, it was damaging to every consumer in town, assuming they could show all of that, still the fact that it is done to the Federal Government is not a basis for these plaintiffs to say they are being discriminated against. They are not

(Testimony of Robert W. Retherford.)

operating an airport. They are not a government. The comparison is absolutely immaterial.

The Court: Well, I assume there is no dispute as to that phase of the law.

Mr. Reischling: There is a dispute to this extent: The power is not being furnished to the government, no matter what counsel says. It is being furnished to private users. The government is in the utility business under contract here, that is, the C.A.A. is a part of it. Such power as it may use for its own incidental purposes is one thing, however, such power as [290] it sells to somebody else is another. That is exactly the same argument that one might raise who said that the government ordinarily can go in and compete with private industry in any private business of any kind. I mean, in fact, this is a preferential treatment to private customers of the government. To carry this thing just a little bit further, if we could tie into the line that the City sells the power to the International Airport on we could buy power at .0282 or .0283, although the users in the community are paying at the rate of 3½ cents.

The Court: Your point is that there is a distinction between selling to the Government as a consumer and selling——

Mr. Reischling: Selling to the Government as a distributor, that is right, and as a wholesaler.

Mr. Rader: If it please the court, I assume if we get into this I will have to bring in government officials to show they wouldn't let anybody on their

(Testimony of Robert W. Retherford.)

premises to build distribution lines. They do rent property and cafe space and hangar space and things like that. This is their own distribution system and their meters and everything else and, secondly, there is a big difference between letting the United States Government sell power through its own distribution lines to consumers and letting a private apartment house corporation sell power through their own lines to consumers and the courts have so held. The courts have proved time and time again that you need not allow another private concern to come in and distribute your energy because of [291] the fact it puts that private concern in such a position to milk the public, milk their tenants, milk anyone else to arbitrarily charge any rate they want and also if charged a flat rate, which is usually done, we discourage the use of consumption of power. That is not true of the Federal Government. The Federal Government, I think we can assume, are going to treat their people reasonably and fairly. I don't care if the International Airport had a hotel on it and was sitting next door to this place out here or if they had 15 apartment houses distributed identically with these, if it was operated, run and managed by the Federal Government it would be in a completely different classification than being operated and managed and run by private persons who are not responsible to anyone except themselves.

Mr. Reischling: The restaurant out there isn't operated and run and managed by the Government.

(Testimony of Robert W. Retherford.)

The man that runs the restaurant merely has a franchise in there and he pays rent. But, after all, this isn't the Government that is in business out there. There are a number of individual consumers or customers and they are actually being favored or could be favored by buying their power at a lesser rate from the distributing system of the Government than other persons competing with them buying from the City. I say that the example that counsel gives is not apropos of the question here at all that this is discriminatory.

Mr. Rader: If it please the court, the example is this, that is, in one place we permitted the Federal Government [292] to distribute power through its own lines to individual consumers which are located on a federal reservation and who rents facilities and equipment and space from the Federal Government at the International Airport. Now, assuming that we do that, still I think that is a lot different and it is outside the City limits, it is a lot different than extending the same privilege to a private consumer, that is, of rehandling or reselling our electricity, so to speak. There is a difference between letting the Federal Government resell our electricity and between letting Panoramic View resell our electricity. In one case the Federal Government presumably, and I think the presumption is warranted, is not going to take undue advantage of the persons that they are reselling to. There is no such presumption as regards private enterprise. It could be—I am not saying they wouldn't be completely fair—but the courts and the utility commis-

(Testimony of Robert W. Retherford.)

sions which have ruled on the question generally say there is a difference and the utility company is completely justified in not allowing a private concern to redistribute energy through anything but their own facilities to the ultimate consumers. I don't have a case which says the Federal Government can but I do have a case here which says a private concern can in no wise insist upon equality of treatment with the Federal Government and that is the question here, whether or not we are going to let them resell our power.

Mr. Reischling: If the court please, I am a little bit astounded. During all of Friday counsel has been talking about primary metering and as pointed out in primary metering establishments [293] the City would own the lines and distribution system to that point. From that point on the consumer would use all of the facilities and could sell—or the power would go through his lines into the particular units.

The Court: But not sell.

Mr. Reischling: Not sell, but then that would—he is using that primary metering argument on the basis that under that guise we could get a lower declining rate as fixed by the published tariffs. Not sell, no. We would have to pay for it, but it would be a much lower rate. Again we are coming right back to a measuring problem where, if it comes through a primary meter and then is distributed, we are entitled, he contends, to a declining rate. But here, this is primarily metered and the Govern-

(Testimony of Robert W. Retherford.)

ment has gone into the distribution and retail business of selling power in competition, that is, to persons using that power in competition with other persons in the same business.

The Court: Well, the evidence that is offered here on recross-examination will have to be excluded, from my view of the law. Have you any further questions?

Mr. Reischling: That is all.

Mr. Rader: No. I wanted to do one thing though and that is——

Mr. Reischling: I mean I am through with this witness.

Mr. Rader: Before we recess I wanted to ask counsel if they would stipulate on this topographical map if we could circle [294] the International Airport in red pencil?

Mr. Reischling: Yes. (So indicated on the map.) Let's circle on the same map Panoramic View.

Mr. Rader: They are all circled. I'd like to do one other thing and that is to draw a line of the approximate City limits and I think that follows generally Chester Creek along like this (drawn on map) that the line enclosed by the red pencil and has red "X" in it is the approximate City limits at this time. Is there any objection to that?

Mr. Reischling: No objection.

The Court: We will recess for 5 minutes.

(Whereupon, at 11:15 o'clock a.m., following a 5-minutes recess, court reconvenes and the following proceedings were had.)

The Court: You may call your next witness.

Mr. Cottis: Call Floyd Reischling.

FLOYD M. REISCHLING

called as a witness for and on behalf of the plaintiffs, and, being first duly sworn, testifies as follows on

Direct Examination

Mr. Cottis: If the court please, one of the uniform rules of the District Court for Alaska, I think it is Rule 9, provides that an attorney in the case may not be a witness without special permission of the court if he intends to argue the case. [295] We ask for that permission. Mr. Reischling is president of Panoramic View Corporation and it is in that capacity we should like to obtain his testimony.

Mr. Rader: I have no objection.

The Court: It may be done.

By Mr. Cottis:

Q. Your name is Floyd M. Reischling?

A. That is correct.

Q. Mr. Reischling, how long have you been connected with the Government Hill project?

A. I have been connected with the Government Hill projects, that is, Panoramic View and Richardson Vista, from its inception. I executed the Richardson Vista lease from the Department of the Military on behalf of the Pacific-Alaska Development Corporation, I believe, in May of 1949, about that time.

(Testimony of Floyd M. Reischling.)

Q. Where is the architect that handled this matter, Mr. Reischling?

A. Mr. Gerald Fields, who was the architect and who prepared the plans and specifications, had a very serious heart attack about 3 years ago and is incapable of doing any type of work or undergo any type of strain whatsoever at this time. I believe he was hospitalized for 6 months.

Q. Now, during 1949-1950 you were engaged in fairly regular discussions with City officials concerning the problems that arose with these establishments, were you not? [296]

A. No, Mr. Cottis. I did discuss with Mayor Loussac and with Mr. Don Wilson matters and things concerning this particular project up to August of 1949, during which time the ground was broken out there for this project. Between the time that ground was broken in August of 1949 and until after the completion of this project I did not come up to Alaska at all. I did not talk with officials between those periods of time.

Q. Did you have any discussions concerning the charges for electricity that would be consumed as house current by these buildings?

A. I can answer that question this way: That at the time these particular projects were set up there was a tremendous housing shortage in this particular area and at that particular time the City of Anchorage had no funds with which to install utilities or to co-operate in any manner whatsoever toward furnishing City services to Government Hill,

(Testimony of Floyd M. Reischling.)

notwithstanding the fact that both the Mayor and the City Manager were very much desirous, in spite of the fact that they could not at that time help, they wanted to co-operate to their utmost to try to get these facilities into the Hill if possible and assured us that in every way possible they would try to give us the full benefit, whatever benefit they could to help us to get the utilities in there. I don't know any other way to put that. [297]

Q. Now, in connection with the utilities—sewer system, for example, these corporations had to supply their own, did they not?

A. That is correct, a sewer system, the water system, the sidewalks, the street lighting, power for the construction, everything had to be furnished by the builder from the time that he commenced and it was our intention, because of the inability of the City to assure us that they could or would furnish the utilities, that we would put in a generating plant ourselves.

Q. For your electrical needs?

A. For the entire project because we had to have assurance that we would have electricity and the boiler house, the heating plant had to be so designed that it would heat the 692 units included within Panoramic View and Richardson Vista and was also designed so there was additional steam. And just prior to the time that ground was broken I went down to Whittier and talked to the Commanding Officer there with reference to obtaining generators, which the Military had abandoned on either

(Testimony of Floyd M. Reischling.)

Attu or Kiska, which could be, they believed, furnished to us for the particular purpose of providing power and electrical energy for these particular projects in the event that the City would say or would determine they could not get power to us.

Q. And you yourself went to Whittier to arrange or to investigate—— [298]

A. It was because of the assurances—I met with Mr. Wilson in Washington, D. C., subsequent to that time and because of the assurances of Mr. Wilson and our belief, which I will say at that time was not based upon any particular rate schedule or utility schedule, it hadn't gotten to that detail, but their apparent willingness to co-operate in every way and their desire to have us as power users caused us to abandon the installation of our own generating equipment on that Hill.

Q. Do you know whether the City was aware of your efforts or your plans to install your own electrical generators?

A. Well, prior to ground breaking we advised the City council that we were contemplating that, oh, I'd say, months before ground was broken for this particular project.

Q. The buildings were completed and occupied during the year 1951, is that correct?

A. That is correct.

Q. Why were the buildings spaced the way that they are?

A. We obtained, as I said before, two leases, one from the Military and one from the Department of

(Testimony of Floyd M. Reischling.)

notwithstanding the fact that both the Mayor and the City Manager were very much desirous, in spite of the fact that they could not at that time help, they wanted to co-operate to their utmost to try to get these facilities into the Hill if possible and assured us that in every way possible they would try to give us the full benefit, whatever benefit they could to help us to get the utilities in there. I don't know any other way to put that. [297]

Q. Now, in connection with the utilities—sewer system, for example, these corporations had to supply their own, did they not?

A. That is correct, a sewer system, the water system, the sidewalks, the street lighting, power for the construction, everything had to be furnished by the builder from the time that he commenced and it was our intention, because of the inability of the City to assure us that they could or would furnish the utilities, that we would put in a generating plant ourselves.

Q. For your electrical needs?

A. For the entire project because we had to have assurance that we would have electricity and the boiler house, the heating plant had to be so designed that it would heat the 692 units included within Panoramic View and Richardson Vista and was also designed so there was additional steam. And just prior to the time that ground was broken I went down to Whittier and talked to the Commanding Officer there with reference to obtaining generators, which the Military had abandoned on either

(Testimony of Floyd M. Reischling.)

Attu or Kiska, which could be, they believed, furnished to us for the particular purpose of providing power and electrical energy for these particular projects in the event that the City would say or would determine they could not get power to us.

Q. And you yourself went to Whittier to arrange or to investigate—— [298]

A. It was because of the assurances—I met with Mr. Wilson in Washington, D. C., subsequent to that time and because of the assurances of Mr. Wilson and our belief, which I will say at that time was not based upon any particular rate schedule or utility schedule, it hadn't gotten to that detail, but their apparent willingness to co-operate in every way and their desire to have us as power users caused us to abandon the installation of our own generating equipment on that Hill.

Q. Do you know whether the City was aware of your efforts or your plans to install your own electrical generators?

A. Well, prior to ground breaking we advised the City council that we were contemplating that, oh, I'd say, months before ground was broken for this particular project.

Q. The buildings were completed and occupied during the year 1951, is that correct?

A. That is correct.

Q. Why were the buildings spaced the way that they are?

A. We obtained, as I said before, two leases, one from the Military and one from the Department of

(Testimony of Floyd M. Reischling.)

the Interior, and Federal Housing Authority requirements fixed a density that is not more than 11 units per acre, I believe, was the maximum number of units that could be placed according to F.H.A. requirements and it was essential and necessary that we supply space for play yards, parking areas and other facilities that the people would have an outdoor area for recreational purposes. [299] The military placed a limitation of two stories on the buildings because of the closeness to the airport and I believe that restriction is still imposed by the military in all construction on Government Hill and that vicinity. They are all two-story structures.

Q. Now, on financing the projects, will you describe what, if any, mortgages were executed?

A. The Richardson Vista was transferred by the Pacific Development Corporation to Richardson Vista Corporation and a note and mortgage was executed by that corporation to secure repayment of a loan which was identical to the note and mortgage executed by Panoramic View Corporation for the 264 units that were covered by that particular mortgage on the Department of the Interior leasehold. The mortgages were identical excepting for differences in amounts. The period of repayment was exactly the same, the interest was the same, and the persons executing the mortgages for both of those corporations was the same.

Q. And there was one single mortgage for each of the two establishments?

A. One single mortgage for each establishment.

(Testimony of Floyd M. Reischling.)

A separate leasehold was taken for Panoramic View boiler house, which is down on the—just above the railroad tracks for convenience in getting fuel, coal. It was designed to eliminate having to haul ashes or having coal dumps or other unsightly [300] situations on the Hill. And I should say the boiler house by that contract must furnish heat to Richardson and to Panoramic View. That is, the units of both have a contract for the length of the leasehold period, each with the other that they will receive heat and pay their proportionate share of the cost of the production of that heat for heating purposes for both projects.

Q. In connection with taxes levied by the City of Anchorage, is each establishment treated as one taxpayer?

A. Each establishment is treated as one taxpayer. Panoramic View gets a separate bill, Richardson gets a separate bill.

Q. You heard Mrs. Hall's testimony the other day, did you not?

A. I was in the courtroom during a portion of it. I didn't hear it all.

Q. Was it with the approval of the two corporations that she offered to bear whatever expense might be necessary to get a combined electric billing?

A. As soon as it was called to the attention of the corporations that the billing apparently was different than it was thought it was going to be Mrs. Hall was asked to take such steps as she could

(Testimony of Floyd M. Reischling.)

to try to get the City to give us what at that particular time the corporations thought they were supposed to get by virtue of the understanding that had been made prior to that. She was the managing agent up here at that time. [301]

Q. And her authority, was it sufficiently broad to include committing the corporations for expenses?

A. Mrs. Hall did do that. She was the managing agent and she was instructed to bring this matter to the attention of the City and do whatever was necessary in order to get what we thought we were entitled to get.

Q. How many classes of apartments are there in these buildings?

A. Well, there is the efficiency units, the 1-bedroom, 2-bedroom and a de luxe unit which is a large 2-bedroom unit. There is approximately 45 or 50 additional feet in the de luxe unit.

Q. Is there any difference in the rentals charged tenants for the same class of apartment?

A. The units in both Panoramic View and Richardson Vista rents for exactly the same figure with reference to the, that is, the efficiency are the same, the 1 and 2 and de luxe are the same unless there has been some recent change in Richardson Vista, but they were the same up at least until Mr. Sarno acquired the Richardson Vista project. I know that the rents charged were identical for the same space.

Mr. Cottis: I have no further questions.

(Testimony of Floyd M. Reischling.)

Cross-Examination

By Mr. Rader: [302]

Q. Mr. Reischling, when did you go to Whittier?

A. I went to Whittier in August of 1949, July or August.

Q. The corporation planned to build its own distribution system?

A. The corporation was faced with the problem it might have to.

Q. You didn't want to do that?

A. Well, the corporation was building rental housing units and, of course, it didn't want to go into the utility business, but was prepared to furnish utilities if it had to do it.

Q. Did your engineers compute a cost for a generating plant and a distribution system?

A. Preliminary estimates had been made which is the reason I went down to Whittier to find out what it would cost or how we would be able to obtain these particular generators that the military had told us had been left on Attu or Kiska after the cessation of hostilities.

Q. Did the F.H.A. ever approve it?

A. No application was made to the F. H. A. to put in that particular generating equipment because by the time it was before the council—it was before July or August because by the time we had broken ground we had had signed, I believe, by the City council Resolution No. 530 by the terms of which we agreed to put in utilities, other than lights, at that time, and they would repay us over a 5-year

(Testimony of Floyd M. Reischling.)

period after completion, I believe, for the money we put in for it. But we had at that time or about that time, as I recall, been assured that [303] the City would co-operate to the fullest of their ability.

Q. But you never had your generating facilities nor your distribution line approved by the F.H.A.?

A. No, that is correct.

Q. And all the plans you submitted to the City—or do you know whether any of the plans you submitted to the City indicated any such——

A. I don't know.

Q. Let me ask you this: Under your system for supplying your own electrical power, it didn't involve any change in the wiring for any of the buildings?

A. It was prior to the wiring, I believe. It was finally submitted to the City—I don't know what the architects or engineers—as I say, they had only made some preliminary estimates and I went down to see what I could do with reference to the generators.

Q. It wouldn't make any difference as to the wiring inside the buildings as to the distribution and generating system?

A. I am not able to say.

Q. So you are not able to say whether the projects altered the wiring on their houses, if they did?

A. I am not able to say.

Q. Mr. Reischling, there are other housing units in this area. Are you familiar with Jefferson Courts and Linda Arms?

A. No, sir. [304]

(Testimony of Floyd M. Reischling.)

Q. You know though they are F.H.A. 2-story buildings?

A. I have never been in Linda Arms. I have never been in Jefferson Courts. I don't know anything about the circumstances under which they were built. I had no connection of any kind whatsoever with any of them.

Q. E & E Apartments?

A. I have never been in E & E Apartments.

Q. Have you ever been in Hollywood—

A. I have. The only time I was ever in Hollywood, I believe, was approximately at about the time that Mr. Harland came up here after Mr. Sarno had acquired the property. I had come up, too, because we were having difficulty getting a manager, too. Mrs. Hall had left and I went in to look at it only for the purpose of determining what type of maintenance had been done there. That is all.

Q. At any rate, you are not intimately familiar with it?

A. I don't know anything about it, no.

Q. Actually your testimony is substantially that in reliance upon the City Mayor's statement and the one City Manager of their desire to co-operate that you didn't put in your own facilities?

A. That is about it. As I told Mr. Cottis, at that particular time it was far too early to talk about application of rate fixing or anything of that kind. That was something far in the future, but when I talked to them their attitude was very co-operative.

(Testimony of Floyd M. Reischling.)

They wanted to do whatever they possibly [305] could to help.

Q. You state Mrs. Hall was authorized to go to the City after she got the incorrect billings, which she considered incorrect billings to try to straighten it out?

A. That was her duty and responsibility as management agent.

Q. Isn't it a fact the reason you didn't put in your generating facilities and own distribution system is because it appeared to be much more economical to you to take power from the City as a businessman?

A. Well, I don't know. I know that we didn't want to go into the utility business if we didn't have to go into the utility business.

Q. What were the instructions of your firm to Mrs. Hall as to what she should do about the billings, precisely?

A. Well, now——

Q. Let me put it like this: Did you authorize her to let contracts for the construction of an independent distribution system to serve the house meters?

A. There was a meeting of the directors of these two corporations in Washington as soon as we had been advised that the City had taken the position that each one of these buildings was a separate and independent customer. That came as quite a surprise because that was contrary to what we had been led to expect. Mrs. Hall was immediately told to go and protest and to bring with her the counsel

(Testimony of Floyd M. Reischling.)

for the corporations who [306] had been acting for them at that particular time and to report back. That is what she did. And from that particular time on all I can tell you is that there has been a number of attempts made on behalf—rather, by the management agent for the corporations to get what we believed to be the just and fair rate to which we were entitled.

Q. Mr. Reischling, where is your office?

A. At 452 Central Building in Seattle, Washington.

Q. I think you told me you had some familiarity with housing projects in Seattle?

A. I represent several, that is, as counsel.

Mr. Rader: If the court will excuse me for just a second.

The Court: We will recess at this time. If there is no objection we will resume at 1:30.

(Whereupon, at 11:50 o'clock a.m. the court continues the cause to 1:30 p.m. of the same day.)

(At 1:30 o'clock p.m., all counsel being present, the trial of said cause was resumed.)

Cross-Examination
(Continued)

By Mr. Rader: [307]

Q. Mr. Reischling, I think you stated you were counsel for several projects in Seattle?

A. That is correct.

(Testimony of Floyd M. Reischling.)

Q. Lakeshore? A. No.

Q. Buren? A. No.

Q. Lockhaven?

A. Yes, I am counsel for Lockhaven.

Q. Mr. Reischling, are you able to tell me whether or not the Lockhaven Apartment development there has received notice that when their present contract expires they will no longer receive combined billings?

A. No, I do not know that.

Q. I assume you are familiar with the ordinances of the City of Seattle?

A. Well, no, I am not, counsel. There are about 10,000 of them, I believe.

Q. That is a rather foolish question. I withdraw it. I am handing you Defendant's Exhibit M for identification and ask you if you recognize the document?

A. Well, I can tell you now, counsel, that I do not. It purports to be a photostat, but I don't know what it is.

Q. Have you ever seen that ordinance before?

A. Not to my recollection. [308]

Q. Mr. Reischling, do you know Mr. Mason LaZelle?

A. I am sure that I met Mr. Mason LaZelle before, but I know that I met him about 2 nights ago and talked with him about 2 nights ago, 3 nights ago.

Q. Who was present at that time?

Mr. Cottis: Your Honor, I can't see the materiality of this.

(Testimony of Floyd M. Reischling.)

The Court: It isn't material by itself but I imagine it is introductory.

Mr. Cottis: Well, I object as being outside the scope of the direct testimony.

The Court: It wouldn't be if it is for the purpose of laying the foundation for impeachment and that is what it sounds like.

Mr. Cottis: Very well.

A. Mr. Hellenthal and myself, and I believe Mr. Retherford, and I believe Mr. Cottis, and maybe Mr. Maffei was there.

Q. Mr. Retherford was there?

A. Yes, I believe that he was.

Q. Where was that?

A. In Mr. Hellenthal's office.

Q. Was that Friday night?

A. Well, could have been Thursday or Friday night.

Q. Did he say anything to you about taking a trip out of town, [309] not being available for this trial?

A. Did he say that to me?

Q. Well, in your presence?

A. Well, I can't recall that but I left. I don't know. I don't remember. I didn't call Mr. LaZelle in there, do you understand?

Q. Yes, I understand that.

A. And I heard some of the conversation with Mr. LaZelle and Mr. Retherford and Mr. Hellenthal but I can't recall his saying that he was going to go out of town or that he was not going to be out of town. I don't remember anything about that.

(Testimony of Floyd M. Reischling.)

Q. Were you there during the complete time, at that meeting?

A. As I recall, I was in and out of his office. I do not believe I was there the complete time. There is a coffee shop down on the corner and I think I did go out and have coffee at one time.

Q. You had occasion to discuss the possibility of his testifying in this case and what his testimony might be?

A. No. I will tell you the result of my conversation with him, that is, the questions I asked him that I recall definitely were with respect to this National Safety Electrical Code and I asked him what sections in that National Safety Electrical Code, if any, would prohibit combined billing and he said there were none and he had never said there were any that prohibited combined billing. I believe he told me the [310] only sections that had to do with single entry service were 2301. That was the particular section which had been discussed before as having reference to the particular problem of metering.

Q. In your discussion with Mr. LaZelle or while you were present did anyone else discuss his testimony?

Mr. Cottis: Your Honor, I make the same objection that I did before.

The Court: I don't know what this is leading up to. It all seems immaterial.

Mr. Rader: If it please the court, there was a good deal of testimony by Mrs. Hall as to her con-

(Testimony of Floyd M. Reischling.)

Conversation with Mason LaZelle at the time he was employed by the City. Since his employment—well, he was discharged or quit or at least the relationship expired existing between Mr. LaZelle, we have a subpoena for him and suddenly find he has left town. I merely wanted to find out. I don't know why he left town, but at any rate this is merely a preface to the testimony later on to the effect he is unavailable to us.

The Court: All you need to do to show a witness is unavailable is to put someone on the stand and state he is out of town or perhaps you can get an agreement here of the parties.

Mr. Rader: I thought perhaps Mr. Reischling would have knowledge of the fact that he is out of town. If he did I could make the showing right now. [311]

The Court: You should ask the question directly instead of going about it in such a round about way and time consuming way.

Mr. Rader: I have no further questions.

Q. (By Mr. Cottis): Mr. Reischling, did you know that Mr. LaZelle was leaving town?

A. I didn't know it until counsel made the statement in court just now.

Mr. Cottis: I have no further questions.

(Whereupon, the witness was excused and left the stand.)

Mr. Reischling: If the court please, just immediately after adjournment at noontime counsel and I,

I think, agreed that we could stipulate that Mr. James St. Amour, whom we have called as a witness, would testify that he is the present manager of Panoramic View Corporation; that he had taken pictures of the meter boards in 3 of the buildings which are illustrative and exactly similar to the meter boards in all of the buildings, that is, one of the photographs contains 23 meters and I will hand that to the Clerk and ask her if she will mark that as an exhibit.

Deputy Clerk: Plaintiff's Exhibit No. 6.

Mr. Reischling: Exhibit 6 is the meter boards of all of the buildings in Richardson Vista, that is, the 19 buildings and of the six 22-, the eight 22-unit buildings in Panoramic View. Exhibit 7 is a picture of the meter board that exists in the four [312] 16-unit buildings in Panoramic View and Exhibit 8 is a photograph of the meter board that exists in the two 12-unit buildings in Panoramic View. If the court please, I offer these in evidence. I also have a typical recap of the utility bill which is furnished to Panoramic View each month, this particular one that I have in my hand is dated July, 1954. The first line of which takes care of the power that is used in the Panoramic View boiler house. The next line is the water bill for Panoramic View and the next—

The Court: Does the exhibit show that?

Mr. Reischling: It doesn't so state. That is why I have read it in the record. The next 14 lines are for the meters that are billed to Panoramic View for the house current, one of the meters being an

apartment meter in which Panoramic View's rental office is located. I would like to have that marked as Exhibit 9. Let the record also show that Panoramic View receives 14 blue tickets showing the amount of power consumed in each of the Panoramic View buildings from which this compilation is made and it also receives, I believe, a blue ticket for the power consumed in the boiler house, so this is actually a compilation of all of the power furnished to Panoramic View plus the water which comes on this for house current only; the tenants' bills being billed to the tenants separately and with which Panoramic View has no concern.

Mr. Rader: If it please the court, in line with that [313] will counsel also stipulate that the only reason that the City made this recap was at the request of the rental agent for the corporation instead of sending merely the blue bills, which is done for all other users—that at the request of your rental agent we consolidated it for them so they would have a record.

Mr. Reischling: Well, counsel, I can't stipulate that they did it for that reason. I just say they have been doing it for more than a year and a half. I don't know the reason. I just know we get that each month.

Mr. Cottis: I think they have always done it and I don't know the reason either.

Mr. Rader: The thing of it is, if you introduced this through Mrs. Hall or some other—whoever the agent was at the time this practice was instituted and I have to assume that would be the way you

would introduce it—by the testimony I think it would be it was done at the request of your people for your convenience.

Mr. Reischling: I do not know. Of course, we could put it in by your witness. He might have his reasons for it or explanation, but I don't know the reason. Your Honor, we just get those bills.

Mr. Cottis: If the court please, will counsel stipulate that the same situation applies to Richardson Vista in principle except for the number of units and so on?

Mr. Reischling: If your Honor please, I would also [314] like to have marked as Exhibit 10 Ordinance No. 283 of the City of Anchorage which was passed and approved on the 24th day of August, 1949, by the council and mayor of the City of Seattle and repeals in Section A-6, Sections 7 to 29, inclusive, of Ordinance No. 55.

The Court: Repeals what sections?

Mr. Reischling: Sections 7 to 29, inclusive, of Ordinance No. 55 which ordinance is Exhibit I in evidence.

The Court: Well, you are speaking of the City of Seattle?

Mr. Reischling: Did I say Seattle? I am sorry—the City of Anchorage. When I speak of city it is automatic to say Seattle. I will offer Exhibit 10 into evidence.

Mr. Rader: Could I look at that for just a second?

Mr. Reischling: Yes. I believe that is a copy furnished us by you, counselor—I am not sure.

Mr. Rader: Did you say Section A-6?

Mr. Reischling: Yes. I can show it to you, counselor.

Mr. Rader: If it please the court, this is the first time I have seen Ordinance 283 and particularly the sections pointed out by counsel. I have no reason to think that what he says about the ordinance is not true, however, I would like the opportunity to check our City Hall records on it.

The Court: Well, as I understand it, then you have no objection but with the reservation that you may be given an [315] opportunity to make an objection later should your investigation——

Mr. Rader: Yes.

The Court: Very well.

Mr. Reischling: Plaintiffs rest.

Mr. Rader: It appears that the sections referred to by counsel are a part of that ordinance, but were never made a part of the code, the general code. At least to my knowledge it is not a part of the general code and for that reason it makes me think that perhaps that ordinance wasn't enacted or that there might have been some changes in it, but I will have to check it.

Mr. Reischling: Plaintiffs rest, your Honor.

Mr. Rader: If it please the court, if that is the close of plaintiff's case I would like to ask for a 10-minute recess in order to check this ordinance because I intend to move for a dismissal at this time and I wanted to argue the matter if your Honor would hear it and this ordinance has a bearing on the argument.

The Court: Well, as I understand it, then you are not able to go ahead with the argument until you check on this ordinance?

Mr. Rader: Without checking on the ordinance, that is correct, your Honor. I don't think it will take me more than 10 minutes to go to the City Clerk and ask him for the original of that and see if it was enacted.

The Court: Well, but what about calling from here? In [316] other words, why not have somebody else look it up instead of you looking it up?

Mr. Rader: All right. With counsel's permission, I would borrow the exhibit.

The Court: Now, is there anybody over at the City Hall who could give you an answer on that immediately?

Mr. Rader: I believe so, your Honor. The ordinances, or old ordinances which pre-date the Anchorage General Code I believe are consecutively numbered, but they are not indexed, the ordinances are not, and I think that with this ordinance number they will be able to ascertain whether or not the ordinance was enacted.

Mr. Reischling: Well, under the circumstances, your Honor, I join with counsel in asking for a recess because I also would like to be present when that is checked.

The Court: I was just thinking that probably that couldn't be ascertained in less than 10 minutes so perhaps we should recess for 10 minutes.

(Whereupon, at 2:10 o'clock p.m., following a 10-minute recess, court reconvenes and the following proceedings were had.)

Mr. Rader: If it please the court, Plaintiffs' Exhibit No. 10, Ordinance 283 which repeals the major portion of Ordinance 55—Ordinance 55 is the ordinance enacted in 1925 by the City of Anchorage and was apparently in effect until 1949 when it was [317] repealed by Ordinance 283. I believe that in our stipulation at the beginning of the trial we stipulated that all provisions of the Anchorage General Code, dated April 12, 1950, as having been enacted as an entire code, was agreed that it would be considered as in evidence as public utility regulations and I think that counsel will stipulate. If he will not I would appreciate his pointing out to me the fact that if the codification as published and as acted upon does not contain a repeal of Ordinance No. 55, although it appears it was validly repealed in 1949, the year previously. Frankly, this comes as quite a surprise to me because of the fact that I had no knowledge and no indexing or method of arriving at this Ordinance 283 and knowing that it contained a repeal in part of Ordinance 55.

The Court: But now is Ordinance 55 one of those in the Code?

Mr. Rader: No, it is not one of those in the Code.

The Court: Was the Code enacted as a code?

Mr. Rader: It was but there was no repeal of—at least to my knowledge—I looked in the Code and I could find no general repealing statute or general

repealing provision, although it does state that certain enumerated ordinances are to be considered in addition to the code.

The Court: Well, then, the question of implied repeal is presented.

Mr. Rader: There is no doubt it was impliedly repealed [318] by the code. The question is whether it actually was repealed, but then that question is no longer, I guess, necessary because of the fact that plaintiffs have produced actually the repealing ordinance of 1949 which predates the code.

The Court: Well, I still am unable to understand what you are surprised by. If that is the case what is it that surprises you?

Mr. Rader: I am surprised by the fact it was repealed, actually.

Mr. Reischling: If the court please, may I suggest that counsel was relying on Ordinance 55 not knowing that Ordinance 55 had been repealed and that is why this is a surprise to counsel today?

The Court: But it seems to me it would be impliedly repealed by the enactment of the code.

Mr. Rader: It could have been and it may have been. I don't know, but apparently the previous City attorneys and the utility company in operation have not considered it as being repealed.

The Court: You mean operating under it?

Mr. Rader: They have been operating—some parts of the ordinance have been repealed and changed. Some of the procedure has been changed by subsequently enacted ordinances and matters which are contained in the agreed code and the

amendment to the agreed code by the council to date since 1950, but the important [319] sections of Section 55 are those which were repealed and nothing was replaced. In other words, it was apparently repealed in 1949 during the time Mr. Hellenthal was City attorney and nothing was enacted to replace it. I suppose that it puts the utility company in a situation as having operated completely without any ordinance as to the matters in essential dispute in this action. However, I am not certain that what I am saying has too much bearing on the question because I am prepared still to argue my motion to dismiss on the evidence presented thus far as to discrimination.

The Court: I don't know yet—nobody has apprised me what it is that Ordinance 55 provides for.

Mr. Rader: Ordinance 55, if it please the court, Section 22, "Supply to separate premises through separate meters. In no event will separate premises, even though owned by the same consumer, be supplied with electricity through the same meter or meters." That is Section 22. Section 24, "Readings of separate meters not combined. For the purpose of making charges all meters upon the consumer's premises shall be considered separately and the readings thereof shall not be combined, except that where the City shall, for operating convenience, install upon the consumer's premises, in place of one meter, two or more meters, then the readings of such two or more meters shall be combined for the purpose of making charges." But, frankly, I don't know what the effect of operating without any

ordinance whatsoever amounts to in the legal significance of this thing, but I don't think it can [320] have too much effect under the law of the case because of the fact that there is no showing—the plaintiffs have only mentioned one instance where they thought that anybody was being treated any differently than themselves and that was the case of International Airport. I am prepared to argue the law on it and am also prepared to go into some of the cases on it if your Honor wants to listen to it.

The Court: Well, you said you wanted to argue a motion so if you want to argue, go ahead.

(Whereupon, arguments on motion to dismiss were made by Mr. Rader, Mr. Reischling, Mr. Cottis and Mr. Rader.)

The Court: If that is all to be said in connection with the motion, the court will deny the motion. You may proceed with the defendant's case.

Mr. Rader: Mr. Nichols, will you take the stand, please?

GEORGE W. NICHOLS

called as a witness for and on behalf of the defendant and, being first duly sworn, testifies as follows:

Mr. Cottis: Your Honor, before the testimony starts I would very much appreciate getting one thing cleared up. Under the direction of the court to produce things we have been lugging back and forth building plans and maps and all that sort of thing and I take this position, if the City wants them, the City [321] can do the lugging from now

(Testimony of George W. Nichols.)

on, but I'd like to be excused from dragging them into court every day.

The Court: Well, I think you are correct in that stand. You produced them so——

Mr. Rader: It seems to me like I asked Mr. Hellenthal if he wanted me to take them with me and he said no that he would take care of them.

Mr. Cottis: I revoke that.

Direct Examination

By Mr. Rader:

Q. Mr. Nichols, will you give us your occupation, please? A. I am the City Comptroller.

Q. As such you have charge of the billing for the City electrical utilities?

A. That is correct.

Q. Mr. Nichols, how long has the present billing practice been in effect to the best of your knowledge?

A. To the best of my knowledge, it has been in effect since I have been employed by the City, which is April, 1950. I have no knowledge prior to that time.

Q. What is that policy insofar as meters are concerned? A. Each meter——

Mr. Cottis: If the court please, I object unless this policy is the policy that existed when this construction was going [322] on. The policy that the City inaugurated or things it inaugurated in November of 1951 when it turned down our request

(Testimony of George W. Nichols.)

leading to this litigation I submit has no bearing at all. That is why we are in court because they said at that time, "We are going from now on to make it our policy to do such and such." I object further on the ground that the City policy is not expressed by what they do in a matter like this, but by what their ordinances, resolutions, tariffs and schedules recite.

The Court: Well, I think that we are kind of quibbling about words. Now, we can call it practice and probably there wouldn't be the same objection although it would mean the same thing when it refers to this method of billing, but so far as the duration of this policy or practice is concerned I don't see where that is particularly material. Practically all of your case depends on or involves the period after 1950 and so far it would appear that whether you called this "policy" or "practice" that it has been in effect for a considerable length of time and there is nothing to negative its existence previous to 1950. And from what has been said here and what has been done it would appear that it was in effect from the time, you might say, that this project was first initiated or at least when there were some discussions as to the rate that would apply. Now, of course, since there weren't other apartments or comparable establishments, so to speak, it might be that you couldn't label it as a policy at that time, but again I think that it is just a quibbling of [323] words. It is immaterial whether it is policy or practice. I think that its legal effect

(Testimony of George W. Nichols.)

would be the same and would have to be governed by the same legal principles. Objection overruled.

Q. I think you stated the policy was metering a separate bill, or would you state it, please?

A. It has been our practice to rate each meter individually. By that I mean whether a customer has one or twenty meters each meter is rated individually. We start at the top rate and work down again rating them through regardless of location.

Q. Now, Mr. Nichols, when did you say you were employed with the City? A. April, 1950.

Q. At that time, Mr. Nichols, were there any 2-story apartment houses or dwellings located in the City of Anchorage and served by the City utility wherein each apartment building housed one meter and each of the tenants had separate meters?

A. Yes. The Alaska Housing Authority has a project at 13th and "I" Street. There is four multiple unit dwellings on that particular part of ground.

Q. Would you describe to us that project physically?

A. There are three of the units facing "I" Street and they have access roads between those and one, I believe, is facing towards the access road with its back towards 12th Street.

Q. Those buildings are two stories? [324]

A. They are two stories, yes, sir.

Q. Do you have any idea of the number of apartments in each building?

A. I would say approximately 16 units in each building.

(Testimony of George W. Nichols.)

Q. And each of those apartments has a separate electrical meter? A. That is correct.

Q. And for each one of the apartment buildings there is a house meter?

A. There is, yes, sir.

Q. And what was the policy in regard to billing of the house meters?

A. Those units were erected in 1946 and as far as I can determine from the meter books they have been rated individually since that time.

Q. Now, since you came with the City, are you able to say they definitely have been metered individually? A. Yes.

Q. What do you mean so far as you are able to determine from the meter books?

A. Our billing record is a meter books which contains the location and the meter readers put in the number and subsequent readings on that. Each one is rated as individual meters.

Q. Then, according to the City records, as to billing the same policy has been followed since your employment by the City, at least it was followed in the case of Alaska Housing [325] Authority units prior to your coming and up to 1946, is that correct? A. Yes, sir.

Q. Mr. Nichols, can you tell us the number of persons taking commercial services from the City who have multiple meters and if you wish to you may refer to your notes?

Mr. Reischling: I object, if the court please. It

(Testimony of George W. Nichols.)

is immaterial and irrelevant. It has no bearing on the issues in this case.

Mr. Rader: If it please the court, the testimony would be principally that there are 90 other persons who have, maybe, on an average of 3 meters apiece, which are not combined. They are under the same schedule as the plaintiffs.

The Court: But would their situations otherwise be comparable because if not it wouldn't have much value.

Mr. Rader: I will admit, your Honor, we haven't been able to go through for that. The reason for showing this was to show that if you adopted the policy of one consumer, having all of his meters combined, that you would end up with, oh, combining 498 meters or something like that for 205 persons. In other words——

The Court: Well, I think you are entitled to show that these apartment house projects aren't the only ones against whom the billing is made in the manner testified to.

Mr. Rader: That is what it would be for [326] precisely.

The Court: As I say, for it to be of any value these other establishments would have to be shown to be comparable, at least in a general way.

Mr. Rader: Well, if it please the court, the only comparable project, other than those mentioned by plaintiffs witnesses, is the Alaska Housing and we have already testified to that. So far as I know there are no other comparable projects in town, but

(Testimony of George W. Nichols.)

this would be only for the simple thing of combined metering for the practice of combining meter readings.

The Court: - I should think that possibly it should be shown just what kind of establishments these others are. In other words, why do they have a multiplicity of meters? I don't know from what has been said here thus far by this witness.

Mr. Rader: I don't believe this witness could testify as to the whys and wherefores on meters.

The Court: Well, it would still be admissible, but its weight, of course, would be affected somewhat by now showing the character of these establishments.

Q. (By Mr. Rader): Mr. Nichols, a person coming under domestic services, how many persons do you have that have multiple meters?

A. Under domestic services?

Q. Excuse me, under commercial services first?

A. Under commercial services we have 90 and that varies from 2 to 17 meters per establishment and those establishments are [327] situated either under one roof or on adjoining pieces of property and limited to 3 city lots in size.

Q. And how about the domestic services?

A. Domestic services, there are 95 having from 2 to 11 meters under the same geographical conditions.

Q. And of other classifications there would be 15 or 18 more persons? A. 19.

Q. 19 more persons that would have combined

(Testimony of George W. Nichols.)

meters? A. Yes.

Q. Mr. Nichols, what per cent of our total number of consumers would you estimate have multi-meters but each meter is computed separately? Could you make an estimate on that?

A. You mean having the same location or different location?

Q. Well, just multiple meters.

Mr. Cottis: I object. It is immaterial.

The Court: Well, I think that this showing is not improper because as I see it it would tend to negative the implication of lack of uniformity or discrimination. That is, the more properties that are served and built in a similar manner the more weight the evidence, the contention would have that there is no discrimination, the practice is uniform. Objection overruled.

A. Due to ownership of one individual or one corporation of more than one piece of property it would probably run at least 10 per cent of our customers who would have multiple [328] meters. That would be roughly 600 customers.

Q. And on any of those are the meter readings combined for the purpose of computing the applicable rate? A. No, sir.

Mr. Rader: That is all.

(Testimony of George W. Nichols.)

Cross-Examination

By Mr. Cottis:

Q. How many of these establishments, Mr. Nichols, were under single ownership and still possessed multiple meters in the summer of 1951? Do you know?

A. No, sir, I don't. These figures are as of December 31. I would name you a few of them but I don't know the number at that date.

Q. December 31 of what year? A. '54.

Q. Do you know of any establishment within the city under one ownership which was energized after the repeal of the Ordinance 55 in August of 1949 where multiple meters were installed before the beginning of this lawsuit?

A. E & E Housing Corporation, Jefferson Courts.

Q. No, they were long after this—if you will excuse me. This lawsuit was started in January of 1952, so do you know [329] of anybody other than Richardson Vista and Panoramic View, possibly Hollywood Vista, which has been paying the charges under protest that fell into that category between August of 1949 and January, 1952?

A. The New Westward Hotel would be one.

Q. When was that?

A. I only know that it was built during that period. I don't recall the exact date it was built.

Q. That is, the new portion of the hotel has a separate meter from the old portion, is that correct?

(Testimony of George W. Nichols.)

A. That is correct and they have multiple meters within that unit now. They have 7 meters now.

Q. That is a leased out restaurant and the lessee has one meter and that sort of thing?

A. No, sir, 7 billed to the Westward Corporation.

Q. Why do they have 7 separate meters, if you know?

Mr. Rader: If it please the court, this witness did not testify as an expert on why they have 7 separate meters or anything else. His only testimony was generally as to billing, that there are so many persons to so many separate meters. I think it is going considerably beyond the direct.

The Court: Yes, I think all his testimony is merely statistical so——

Q. (By Mr. Cottis): Are the 7 separate meters for the Westward Corporation all on [330] the commercial rate, Schedule C Rate?

A. Yes, sir, under C-1 Schedule.

Q. The whole 7? A. Yes.

Q. (By Mr. Reischling): Mr. Nichols, maybe I got the figures wrong but I have it that you said 205 individuals, that is, persons having 495 meters in this combined billing. Is that correct?

A. Those would be people that are under one roof or situated on approximately 21,000 square feet.

Q. And of the 205 persons you said that it was divided into a commercial service and under commercial service you had installations run from 2 to 17 meters, is that correct? A. Yes, sir.

(Testimony of George W. Nichols.)

Q. How many are there in that category?

A. 90.

Q. Now, so I understand correctly; in that category all of these people are their meter readings combined and they are given one bill?

A. No, sir.

Q. They are not?

A. No, sir. Their meter readings are rated individually for each meter.

Q. The readings are not combined?

A. No, sir. [331]

Q. And that is also true of the domestic users, the 95 I believe that you said?

A. That is correct.

Mr. Reischling: That is all.

Mr. Rader: I believe that is all. Excuse me, one more question.

Redirect Examination

By Mr. Rader:

Q. Mr. Nichols, perhaps I misunderstood Mr. Cottis' question but Alaska Housing Authority—to make this clear how has Alaska Authority authority with its 2-story apartment buildings out there, there are 3 or 4 of them, they have been consistently billed the same way since 1946. Is that not true?

A. As far as I can tell from our records, yes, sir.

Q. And you know it to be a fact since 1950 from your personal knowledge?

A. That is right.

Q. And that is in the same manner as Panoramic View Corporation and Richardson Vista are billed

(Testimony of George W. Nichols.)

and have been billed? A. Yes, sir.

Mr. Rader: That is all. [332]

Recross-Examination

By Mr. Reischling:

Q. In connection with that, Mr. Nichols, you know Mr. Glenn Wilder, do you not?

A. Yes, sir.

Q. Did Mr. Glenn Wilder come down to you and discuss with you the getting of combined billing for Alaska Housing Authority units approximately 21½ years ago?

A. He did not discuss it with me, no.

Q. You know that he did discuss it with the City Manager, do you not? A. Not that I know of.

Q. You didn't hear that at all?

A. No, I have no knowledge of it.

Mr. Rader: At any rate, he has never been given combined billing.

A. No, he has not been given combined billing.

Mr. Reischling: That is a Government operation, is it not, the Alaska Housing Authority?

A. I am not sure just exactly what operation that is. I understand that it is not a federal agency—that it is not specifically a federal [333] agency.

Mr. Reischling: It is under the jurisdiction of the United States Government, is it not?

Mr. Rader: The court can take judicial notice

(Testimony of George W. Nichols.)

Q. How many are there in that category?

A. 90.

Q. Now, so I understand correctly; in that category all of these people are their meter readings combined and they are given one bill?

A. No, sir.

Q. They are not?

A. No, sir. Their meter readings are rated individually for each meter.

Q. The readings are not combined?

A. No, sir. [331]

Q. And that is also true of the domestic users, the 95 I believe that you said?

A. That is correct.

Mr. Reischling: That is all.

Mr. Rader: I believe that is all. Excuse me, one more question.

Redirect Examination

By Mr. Rader:

Q. Mr. Nichols, perhaps I misunderstood Mr. Cottis' question but Alaska Housing Authority—to make this clear how has Alaska Authority authority with its 2-story apartment buildings out there, there are 3 or 4 of them, they have been consistently billed the same way since 1946. Is that not true?

A. As far as I can tell from our records, yes, sir.

Q. And you know it to be a fact since 1950 from your personal knowledge? A. That is right.

Q. And that is in the same manner as Panoramic View Corporation and Richardson Vista are billed

(Testimony of George W. Nichols.)

and have been billed? A. Yes, sir.

Mr. Rader: That is all. [332]

Recross-Examination

By Mr. Reischling:

Q. In connection with that, Mr. Nichols, you know Mr. Glenn Wilder, do you not?

A. Yes, sir.

Q. Did Mr. Glenn Wilder come down to you and discuss with you the getting of combined billing for Alaska Housing Authority units approximately 21½ years ago?

A. He did not discuss it with me, no.

Q. You know that he did discuss it with the City Manager, do you not? A. Not that I know of.

Q. You didn't hear that at all?

A. No, I have no knowledge of it.

Mr. Rader: At any rate, he has never been given combined billing.

A. No, he has not been given combined billing.

Mr. Reischling: That is a Government operation, is it not, the Alaska Housing Authority?

A. I am not sure just exactly what operation that is. I understand that it is not a federal agency—that it is not specifically a federal [333] agency.

Mr. Reischling: It is under the jurisdiction of the United States Government, is it not?

Mr. Rader: The court can take judicial notice

(Testimony of George W. Nichols.)

of that, I believe, and we can point that out by statute.

Mr. Reischling: Isn't that so or do you know?

A. I do not know the setup.

Mr. Reischling: That is all.

(Thereupon, the witness was excused and left the stand.)

The Court: We will adjourn to 10:00 o'clock tomorrow morning.

(Whereupon, at 5:00 o'clock p.m., court was adjourned to the following morning, March 29, 1955, at the hour of 10:00 o'clock a.m.) [334]

Mr. Reischling: May it please the court, I received a telegram this morning, as did other counsel, from Mr. Herman Sarno who testified as a witness the other day and I would like to read it into the record. The telegram is dated Hollywood, California, March 29.

The Court: It is agreeable now it may be read into the record?

Mr. Rader: Yes, it is a correction of the testimony.

The Court: I thought you would insist on the right to impeach. If not, go ahead and read it into the record.

Mr. Reischling: It is addressed to me, c/o Justice Folta, Courtroom, United States Courthouse, Anchorage. "This telegram to Justice Folta. Have just asserted an error in my testimony of

Richardson against Anchorage. Respectfully request change to be requested in record. Fact is Kenwood Gardens, Toledo, Ohio, did not receive combined billing and is individually metered. Copy this wire going to all attorneys. Please accept my thanks in advance for your kind cooperation. Request that you record this accordingly. Signed Herman B. Sarno.”

The Court: You may call your next witness.

Mr. Rader: Call Mr. Reuss.

WILLARD H. REUSS

called as a witness for and on behalf of the defendant, and being [336] first duly sworn, testifies as follows on

Direct Examination

By Mr. Rader:

Q. Would you give us your full name and spell your last name?

A. Willard H. Reuss. That is spelled R-e-u-s-s.

Q. Give us your occupation?

A. Electrical Engineer.

Q. In what states are you licensed as an electrical engineer?

Mr. Reichling: The Plaintiff Panoramic View will accept Mr. Reuss' qualifications as an engineer.

Mr. Rader: How about as a rate analyst?

Mr. Reichling: And as a rate analyst. This is not a rate case, however, and at this time and for the record I will object to any testimony relating to the rates or fixing of rates, that not being in issue in this case. It is, therefore, irrelevant and imma-

(Testimony of Willard H. Reuss.)

terial, inconsequential, has no bearing upon the issues whatsoever and I will ask that the objection if overruled that the record show that it go to the entire testimony with regard to any rates or rate fixing.

The Court: I am wondering how it can be said that the matter of rates is not involved.

Mr. Reischling: I beg your pardon.

The Court: The contention of discrimination would necessarily involve rates.

Mr. Reischling: If the court please, as I have tried to [337] point out we are talking about the application of a published rate which is clearly distinguishable from the making or fixing of a rate. Based upon a capital investment we are not trying the rate.

The Court: Of course, that is true, but it seems to me that it is impossible to separate from the controversy the matter of what rate is to be applied.

Mr. Reischling: Well, under the law the City knows and we have submitted cases as to what is the most favorable rate that they can apply to each individual class of customers.

The Court: But have you anywhere set forth, even by way of oral argument, what you contend the rate is that should be applied here?

Mr. Reischling: We have in evidence Exhibits C, D, E, F and G, I believe the published rate schedules which apply to the various classifications of customers and as to which particular rate we are

(Testimony of Willard H. Reuss.)

entitled to get would depend upon the interpretation of that, let's say, particular published——

The Court: Certainly, but you have a contention in that respect. Don't you contend that so and so should be the rate?

Mr. Reischling: Under the law we do not have to do that.

The Court: You don't have to but don't you do so in this case?

Mr. Reischling: We are talking about the most favorable rate that is published, not something else.

The Court: Do you have anything to say as to qualifying [338] this witness as a rate analyst?

Mr. Rader: Well, I can qualify him as a rate analyst and I intended to because what I intended to show by the witness, your Honor, is generally—that is, his experience as to one custom and usage in the various states and with various public power projects as to metering and billing. I wanted to also show the difficulties of primary metering as requested by plaintiffs and his opinion as to the same in the instant case under the present circumstances. I intended to show the error in plaintiff's argument throughout this case and that is the figuring of rates upon what is known as incremental cost, being the cost which is added to the utility to serve a particular customer as showing that that being generally inapplicable in the present situation and not considered a proper rate practice generally in the United States, with exception. There are exceptions to all of these things. I intended to show

(Testimony of Willard H. Reuss.)

the different types of primary metering and their applicability to the present case or inapplicability.

The Court: Well, the objection will be overruled. What about the other plaintiff. Is the other plaintiff willing to admit the witness' qualifications?

Mr. Cottis: Your Honor, I know nothing about Mr. Reuss. I would like to have him qualified.

The Court: Then, of course, the stipulation on behalf of the other plaintiff as to his qualifications as an electrical [339] engineer serves no purpose unless both plaintiffs join. So you will have to qualify him.

Mr. Reischling: May I just for the record once more, my further objection to any testimony on this light goes to the fact it hasn't been set forth in the Answer in any way and that, therefore, is outside the issues as drawn in this proceeding.

The Court: Objection overruled. It doesn't have to be set out by answer.

Q. (By Mr. Rader): Mr. Reuss, would you tell us what states you are licensed as an electrical engineer?

A. Wisconsin, Nebraska, Mississippi, Louisiana, Colorado.

Q. Would you give us your experience briefly or—will the court permit me to lead. You were employed at one time by the Wisconsin Power Commission?

A. Wisconsin Public Service Commission.

Q. And that is a regulatory agency of the state of Wisconsin?

A. That is correct.

(Testimony of Willard H. Reuss.)

Q. Regulating power rates?

A. Regulating public utilities including electricity, telephone, water, gas.

Q. And how long did you work for them?

A. About 8 years, from 1934 to about 1942.

Q. And in that capacity did you have occasion to treat with, examine and familiarize yourself with rate application and [340] rate studies and rate analysis for electrical utilities?

A. Yes, sir. I might qualify that to this extent, that the duties of the engineering department was to prepare evaluations and for the purpose of making rate basis for the utilities, also the evaluation is in order to set up their plant.

Q. I believe I omitted—would you give us your educational background, please?

A. I have my BS and MS degree in electrical engineering from the University of Wisconsin.

Q. After the cessation of your employment with the Wisconsin Public Service Commission in what capacity or what was your occupation?

A. In May of 1942 I went with the firm of R. W. Beck Associates where I was hired as evaluation engineer. I have progressed in their organization up to principal engineer and am now present manager of their Columbus office.

Q. How many engineers are employed by your concern?

A. About 27. In addition to that we have about 9 analysts and probably a total of about 65 employees.

(Testimony of Willard H. Reuss.)

Q. Does your firm do work in the majority of the states?

A. Well, we do work as far north as Fairbanks, Alaska, and as far south as Key West, Florida. I don't know—we have worked in every state in the Union, but we have worked principally in the states of Washington, Nebraska, Louisiana, and Florida although we have done work in other states [341] which is Mississippi and Iowa.

Q. Would you describe the functions of your firm, what they do?

A. Our functions are very detailed. We make feasibility reports for financing which requires that we investigate the rate structures of utilities. We make comprehensive engineering reports for public power districts which requires a review of the reasonableness of rates. We are continuously in consultation with clients on the operation and management of public utilities as, for example, Nebraska we are working on a feasibility report now which is a combination flood control, irrigation and power which in respect to the power we are negotiating a power contract with the Nebraska Public Power System. We also make rate studies. Some of the most recent rate studies which I have made is for the Cohama Electric Power Association in Mississippi and am presently engaged in making a rate study for the Delta Power Association.

Q. Where is that?

A. That is in Greenwood, Mississippi. We have made rate studies for the City of Key West. In

(Testimony of Willard H. Reuss.)

accordance with their bond resolution we have to approve all of their rates and rate policies.

Q. Is your firm nationally recognized by bonding authorities for financing purposes?

A. Yes, our reports are used in numerous instances for the financing of revenue bonds and some of the bonding houses which [342] have relied on our reports are John DeVanco and P. J. Banks and others. One feasibility report that was made was for the Rock Island Dam down in Washington which involved about forty million dollars.

Q. Does a considerable part of your work have to do with public utilities and more specifically municipalities owned and operated utilities?

Mr. Cottis: Your Honor, it is not clear to me now whether counsel is referring to Mr. Reuss' own work or to the firm's own work. I will stipulate the qualifications of the firm of Beck and Associates.

Q. As to your own work?

A. It is mostly in a supervisory——

The Court: Does he act in a supervisory capacity as far as the firm is concerned?

Q. In your firm you are third in command?

A. Well, the chief engineer is Mr. Beck then there are two principal engineers, myself and Mr. Wallace.

Q. In that capacity you are in a supervisory relationship to the rest of the persons in the firm?

A. I am for the Columbus office which handles certain business in the area which is Consumers

(Testimony of Willard H. Reuss.)

Public Power District and Public Power District in Nebraska. My job is to also take care of the city of Key West and also the City of LaFayette, Louisiana. Those are clients of which we are on continuous engineering [343] basis. And I might add all the mid-state reclamation districts which is a combination of flood control, power and irrigation projects. May I add this to that, it is the policy of our firm to ship personnel as they are needed in various areas and that is probably the reason that I am up here.

Q. Actually you intend to work all over the country where you are needed?

A. That is correct.

Q. Your firm also operates as construction engineers, do they not, or supervising engineers?

A. Yes.

Q. Supervisory personnel for power plants?

A. That is right. At present we have two projects out of my office. That is the City of Farmington, New Mexico, where we are constructing two 3,000 kw steam turbine generators and for the City of Key West we are planning a 16,500 kw steam generating unit.

Q. I believe you stated that your work includes municipality owned utilities?

A. That is correct.

Q. Mr. Reuss, do you know of any examples where a utility could, operating in an urban area supplying retail power, use the method of primary metering and deduct from the primary central

(Testimony of Willard H. Reuss.)

meter all tenants consumption to determine the rate to a [344] particular consumer for multiple point delivery?

Mr. Reischling: I object to that.

Mr. Cottis: I object, your Honor, unless counsel bring the question within the scope of the Anchorage situation, namely, a similar published tariff and a similar lack of rules, regulations and ordinances, otherwise it is immaterial.

The Court: Well, I think that there is a good deal of merit to that objection except that where his experience would not encompass any such situation as that and it is highly improper he may answer the question although the weight of the testimony will be affected by, of course, the lack of similarity in these conditions and circumstances. You may answer the question.

A. Well, the answer would still be no.

Mr. Rader: Mr. Reuss, with the court's permission, and I guess it takes the court's permission, instead of building a hypothetical question of considerable length, I would request permission—Mr. Reuss has heard all of the testimony in this trial—and I would request that with the physical circumstances as have been described here and which are not in dispute and which the parties have stipulated to, if on that basis, he can testify as to the Anchorage situation?

Mr. Reischling: Of course, if the court please, I object to any such type of dissertation on the part of this witness. A hypothetical question must

(Testimony of Willard H. Reuss.)

embrace all of the elements of all of the evidence that has been introduced, together with the [345] conclusion of anyone else who has theretofore testified before this specific question can be asked this man, and, of course, the record would be silent. No one would know what was in the mind of this witness and it is obviously inadmissible.

The Court: I don't know why it is inadmissible. That is one well known way of getting the opinion of an expert, either by way of a hypothetical question or on the basis of the testimony that he has heard. The objection is overruled.

Q. (By Mr. Rader): Mr. Reuss, you have been in constant attendance and have heard all the testimony in this case, have you not? A. I have.

Q. Considering the physical situation as exists in the Panoramic View and Richardson Vista projects and its service by the City of Anchorage, the policy of tenant metering, do you know of any similar situation in the states where primary metering is used, all the power goes through one meter and the individual tenants' meters are combined and subtracted from the over-all reading to give a rate to the house consumer? A. I know of none.

Q. Do you know whether or not it is done?

A. Well, not in exactly the same case. Would you make yourself a little more clear on that? You mean in respect to retail rates?

Q. Retail rates. [346]

A. In respect to retail rates, no. However, in respect to where there is interchange of energy

(Testimony of Willard H. Reuss.)

between utilities that policy is sometimes followed, that is, where there is wholesale rates.

Q. It could be done? A. Yes.

Q. It wouldn't be difficult as far as the physical application?

A. It wouldn't be difficult for it to be done.

Q. Physically? A. No.

Q. Mr. Reuss, are you familiar with situations, or would you say it is a common practice in the states under a situation as exists locally with the Panoramic View and Richardson Vista corporations to bill and meter precisely as the City has done in this case?

Mr. Reischling: I object to that, if the court please. The question does not show precisely what has been done. In any event, it is immaterial, irrelevant and the City has not plead any practice or custom based upon the same situation existing here in any other state. I am merely making this objection for the record and I will ask at this time that the record show that I may have a continuing objection to all of this line of testimony.

The Court: I think you have already stated that you want to have an objection recorded to all this testimony. The objection is overruled. [347]

Q. (By Mr. Rader): Let me rephrase my question just a little bit. Mr. Reuss. Would you say it was customary or not for a city to meter and bill as the City of Anchorage is metering and billing Panoramic View and Richardson Vista?

A. It is not only customary but I would recor -

(Testimony of Willard H. Reuss.)

mend it to any clients of mine to do it just exactly like the City of Anchorage had done.

Q. Your testimony is not that there are not exceptions to that rule where the people do not take exceptions to it?

A. There are exceptions to it.

Q. The practice of conjunctive billing or combined billing where separate meters are read and combined for purposes of giving a lower rate, you are generally familiar with that practice?

A. I am.

Q. In your experience and in your opinion is that a desirable practice?

A. That is not a desirable practice.

Q. Would you tell us why?

A. Well, one reason why is you get into difficulties trying to determine what your average costs are. You get into difficulties trying to determine where the responsibilities between your point of delivery and the facilities that are between the point of delivery and where the rest of your system starts. I think the parties in this case—well, as an example, in [348] this case how would you allocate your cost for the distribution facilities that you have between your tenants and your customers? You have to take all costs into consideration.

Q. Well, Mr. Reuss, to be uniform in the practice of conjunctive billing would you or would you not have to apply the—well, strike that—Mr. Reuss, what is the practice generally called in rate making

(Testimony of Willard H. Reuss.)

where you take and consider the additional out-of-pocket cost to serve a particular client?

A. That is known as incremental cost.

The Court: Will you explain what that is again?

A. Well, that is where you just consider—let me give you an example, which was pointed out in the previous testimony, where the meter reader only takes 30 seconds to read the meter. That is an incremental cost. Whereas, it takes time for him to get to that place and you would take all the meters he reads in a day, that would be average costs.

Q. Would you carry that example a little bit further and apply incremental cost to the service through the distribution facilities of a particular customer?

A. What do you mean by service?

Q. Well, for instance, its supplying the power through the distribution facilities?

A. Well, another example of incremental cost, you might take a power plant as a good example. As in the steam plant as you load that steam plant up your cost per kilowatt hour becomes [349] less. If we assume that we add a customer to that load the incremental cost would—the additional cost you would be put to by adding that customer would be very slight, but when you analyze your power plant cost you determine your average cost and not your incremental cost. Does that answer your question?

Q. That would apply also to distribution lines?

A. That is right.

Q. In the present case on Government Hill your

(Testimony of Willard H. Reuss.)

incremental cost would be very, very small so far as power lines are concerned, those existing to serve Richardson Vista and Panoramic View, the house meters? A. That is correct.

Q. I want to ask you now generally what your experience is as to the practice of predicating rates for an individual consumer for electricity supplied in an urban area, retail power, as to using incremental cost instead of average cost?

A. Generally you apply your average cost to your rates to see how you are coming out. In other words, you take all your costs into consideration, your investment in your whole system, your operating and maintenance expenses in your whole system.

Q. Are there exceptions to that?

A. There are.

Q. Would you say that was the general practice in rate making [350] under the circumstances described?

A. I could do better if you would let me give an example of where it is used.

Q. Go ahead.

A. In this mid-state project we have reversible turbines which can be used either to generate or pump water. We are entering into a rate negotiation with the Nebraska Public Power System whereby we can purchase incremental power at the cost of incremental fuel from the Nebraska System to raise that water during the night period when the load is low, pump the water back and produce what is

(Testimony of Willard H. Reuss.)

called O.P. Power. There they are getting an incremental rate because it is of advantage to both parties.

The Court: What do you call that kind of power?

A. Off-peak power. That is during the night when the load is low usually.

Q. What is your experience as to the use of primary metering in those instances where, let's assume that the tenants in a housing project received a flat rate, electrical rate, that would be so much per apartment unit. As I understand it now, assuming——

A. That has been done, primary metering, where the distribution facilities are owned by the customer.

Q. And generally when they have a flat rate?

A. Well, by flat rate you mean where the cost of electricity is [351] included in the rental fee?

Q. Yes. A. Yes.

Q. Now, assuming that situation. From your experience what are the problems to that practice which make it undesirable?

A. From a utility viewpoint what usually happens is the operation of maintenance of those facilities usually becomes the responsibility of the utility, that is, the customer asks the utility to operate and maintain those properties. If we have a transformer outage the utility is requested to replace that at cost. Another objection to that is, from the customer's viewpoint if you have a storm or dam-

(Testimony of Willard H. Reuss.)

incremental cost would be very, very small so far as power lines are concerned, those existing to serve Richardson Vista and Panoramic View, the house meters? A. That is correct.

Q. I want to ask you now generally what your experience is as to the practice of predicated rates for an individual consumer for electricity supplied in an urban area, retail power, as to using incremental cost instead of average cost?

A. Generally you apply your average cost to your rates to see how you are coming out. In other words, you take all your costs into consideration, your investment in your whole system, your operating and maintenance expenses in your whole system.

Q. Are there exceptions to that?

A. There are.

Q. Would you say that was the general practice in rate making [350] under the circumstances described?

A. I could do better if you would let me give an example of where it is used.

Q. Go ahead.

A. In this mid-state project we have reversible turbines which can be used either to generate or pump water. We are entering into a rate negotiation with the Nebraska Public Power System whereby we can purchase incremental power at the cost of incremental fuel from the Nebraska System to raise that water during the night period when the load is low, pump the water back and produce what is

(Testimony of Willard H. Reuss.)

called O.P. Power. There they are getting an incremental rate because it is of advantage to both parties.

The Court: What do you call that kind of power?

A. Off-peak power. That is during the night when the load is low usually.

Q. What is your experience as to the use of primary metering in those instances where, let's assume that the tenants in a housing project received a flat rate, electrical rate, that would be so much per apartment unit. As I understand it now, assuming——

A. That has been done, primary metering, where the distribution facilities are owned by the customer.

Q. And generally when they have a flat rate?

A. Well, by flat rate you mean where the cost of electricity is [351] included in the rental fee?

Q. Yes. A. Yes.

Q. Now, assuming that situation. From your experience what are the problems to that practice which make it undesirable?

A. From a utility viewpoint what usually happens is the operation of maintenance of those facilities usually becomes the responsibility of the utility, that is, the customer asks the utility to operate and maintain those properties. If we have a transformer outage the utility is requested to replace that at cost. Another objection to that is, from the customer's viewpoint if you have a storm or dam-

(Testimony of Willard H. Reuss.)

age is done to the facilities the utility usually takes care their customers, that is, their customers up to the metering point. They usually take care of repairing and maintaining those first so that you get a dissatisfied group of customers. That is always an unhappy situation.

Q. How about the divided responsibility for the lines?

A. Well, there is a question of law as to that which I am not qualified to testify on, but as to where utility operations stop and start it usually becomes a problem.

Q. Generally speaking that is a matter of policy with the utility company?

A. That is correct. It is a matter of policy.

Q. Now, that is usually determined by negotiations, lawsuits or [352] how?

A. By negotiations.

Q. Mr. Reuss, in your opinion what would be the effect on a rate structure of a change from individual metering and billing as practiced by the City of Anchorage to conjunctive billing or that situation where you combine readings to determine the lowest rate?

A. You would have to take your rate schedule and reanalyze it to see how the costs were divided.

Q. Would you carry that a little bit further, explain that?

A. Well, first of all when you make a rate study you determine what the policy of the particular utility is and use that as a basis for determining

(Testimony of Willard H. Reuss.)

what sort of blocks you desire to make in your rate structure. If you change your policy then you would have to change your rate. It might mean reallocation of costs and raising rates in one particular group and adjusting them in the other. I can't tell without making a study as to just exactly what the effect would be, but it would change your rate structure.

Q. Perhaps we covered this but to make sure, in your experience and in your opinion would the practice of the City of Anchorage in their billing and metering of Panoramic View and Richardson Vista be an approved practice in the states and approved by the various regulatory commissions which would pass on the same? [353]

A. Yes.

Mr. Rader: I believe that is all.

Cross-Examination

By Mr. Reischling:

Q. Mr. Reuss, do I understand your testimony correctly that the cost of serving, that is, the present additional cost of serving the halls in Panoramic View as the buildings are now wired is negligible as compared to the cost of bringing the entire output of power to the place, that is, there are 22 meters in the building for the apartment users and there is one meter that measures the power that is consumed by the halls?

A. That is true and that is also true to any customer that is added.

(Testimony of Willard H. Reuss.)

Q. There would not be any needed addition to the line distribution facilities themselves to serve this additional hall customer than you already have or than would have been required if the hall customer was not furnished? A. That is correct.

Q. Now, do I understand, Mr. Reuss, that you have experted, we will say, municipalities in your engineering capacity?

A. What was that? [354]

Q. Experted was the word I used. That is, did you analyze their rate schedules and help them in fixing rates and so forth? A. That is correct.

Q. What other municipalities have you worked on other than Anchorage?

A. Oh, principally Key West, Florida, and the City of LaFayette.

Q. Key West, Florida, when did you work in that particular city?

A. Well, it has been continuous. I go down there about 4 or 5 times a year.

Q. Is that in connection with their rate schedules?

A. Well, it is in various capacities. It isn't all rates that I go down there on.

Q. Have you actually worked in a rate hearing in the City of Key West, Florida, at which time the rates were fixed which were to be charged the consumer?

A. It wasn't necessary for a rate hearing.

Q. Is your answer to that yes or no?

A. Well, the way you pose the question the answer is no.

(Testimony of Willard H. Reuss.)

Q. Have you engaged in any rate hearing involving the rates of this other city that you say you worked in? What was the name of that?

A. LaFayette. The conditions are the same as at Key West.

Q. In other words, you have not participated in any rate study, fixing the rates for the City of LaFayette?

A. No hearing. [355]

Q. Then if there was no hearing there was no particular analysis, isn't that correct?

A. That is incorrect.

Q. It isn't correct. Rates were, however, fixed there?

A. That is correct.

Q. During the time that you were there?

A. That is correct.

Q. Were they fixed pursuant to ordinance?

A. Well, the rates were analyzed and the ordinance adopted from our analysis.

Q. Doesn't the ordinance there require that there be a public hearing before rates are fixed?

A. I don't believe so.

Q. You don't think so. Now, Mr. Reuss, when you go to a city like Key West, Florida, or LaFayette or Anchorage how do you determine the practice and policy of the city with respect to the furnishing of utilities for the residents of that city?

A. Well, usually I contact the manager and go over their rate policy to see what it is and——

Q. The manager?

A. That is right.

Q. In other words, you discuss it with the manager and he tells you what his policy is, is that cor-

(Testimony of Willard H. Reuss.)

rect? A. That is correct.

Q. And whatever he tells you his policy is that is the policy of [356] the city, is that correct?

A. It usually is.

Q. Do you know how municipalities are operated, Mr. Reuss, ordinarily?

A. In what respect?

Q. Well, under what powers—where do they get their powers and so forth?

A. Well, it is my understanding they get the powers from the City council and it varies from municipality to municipality.

Q. Isn't it a fact, Mr. Reuss, that you know that the policies of a city are determined by the ordinances of the city? A. Well, not necessarily.

Q. What——

A. Let me—can I clarify myself?

Q. Well, if you can.

A. On the rate ordinance at Key West we analyzed the rates and recommended certain rate structures from which the ordinance was set up.

Q. In other words, you go behind the ordinance, is that correct? A. You may state it that way.

Q. Now when you come to a city like the City of Anchorage and you find there is no ordinance at all then you take the position that is declared to be the position of the City by the City Manager?

A. Manager or operating personnel. [357]

Q. And if the city manager changes 4 times a year the policy changes 4 times in a year depending upon every whim of the particular city man-

(Testimony of Willard H. Reuss.)

ager? A. It might.

Q. And the published rates then so far as concerned have absolutely nothing whatsoever to do with the duty of the municipality to furnish power to the consumer? A. Would you repeat that?

(Whereupon, the last question was read by the Reporter.)

Mr. Rader: If it please the court, I object. He is asking him now and has been asking him about legal matters actually as to where the powers come from and what the city manager can do and that type of thing which he is not an expert lawyer and not an expert probably on published rates or the effect of published rates or anything else. He is a rate analyst and it is going a lot beyond the direct examination. He is an engineer.

The Court: Will you read that last question to me?

(Whereupon, the question Line 5 above was read by the Reporter.)

Q. Or the rate or cost to the consumer of the power to be furnished by the City?

The Court: I think you better rephrase your question. It is getting to be somewhat unintelligible now principally because, I think, it is broken up.

Q. Then I will rephrase it. Then so far, Mr. Reuss, as I [358] understand your testimony the rates and regulations as published by a municipality for the furnishing by that municipality of utility

(Testimony of Willard H. Reuss.)

service to the consumer are not binding upon the utility in any manner whatsoever?

A. I wouldn't say so.

Q. Well, how would they be binding?

A. What I mean to say is that your rates are indirectly based on policy. I mean, you can't separate one from the other.

Q. Now, in this particular instance——

The Court: When you say "this particular instance" you mean the City of Anchorage?

Q. The City of Anchorage—with reference to Exhibit D. Will you look at Exhibit D and tell me if you have seen it before, if you are familiar with it?

A. Yes, I have seen it.

Q. Now, do you, after knowing—I mean, notwithstanding their published schedule—go to the City Manager and ask him what his policy is with reference to rates?

A. Would you ask that again?

Q. Do you, notwithstanding the fact that, we will say, know of the published schedule of April, 1953, notwithstanding that fact go to the City Manager and ask him if his policy is different from that published schedule?

Mr. Rader: I object unless counsel wants to state what Mr. Reuss would be doing looking at the rates. Now if the City [359] Manager called him in and said "We want a rate analysis" that might be one thing. I don't know. There could be a lot of reasons why he would go to the City Manager.

(Testimony of Willard H. Reuss.)

Mr. Reischling: I will withdraw that question and I will ask you this——

Q. Which do you follow the policy and practice as outlined to you by a city manager or the published rate schedule?

The Court: But in doing what?

Q. In making your analysis then, we will say, or determining the practice and policy of the city?

A. We do both.

Q. You do both, but the practice and policy as declared by the City Manager has more weight than the published rules and regulations determining the policy, is that not so?

A. They——

Mr. Rader: He is asking for a legal conclusion which this man is not qualified to speak on. It is for your Honor to decide things of that nature.

The Court: I think the question also assumes that the policy and the rate schedule is incompatible and I think that that is a rather unwarranted assumption here.

Mr. Reischling: I think, if the court please, that it was testified to by the witness as the record will show.

The Court: I don't know of any such testimony and if there was there wasn't any testimony here that this witness [360] participated in anything of that kind.

Q. Mr. Reuss, as a matter of fact you have been retained by the City of Anchorage to analyze its rates, have you not?

A. Our firm has.

(Testimony of Willard H. Reuss.)

Q. And how long have you been engaged in that work? A. I don't know exactly.

Q. When did you start?

A. Well, I mean I wasn't the one that made that rate analysis.

Q. When was the rate analysis made?

A. I believe about 1952.

Q. And how many times since 1952 have you been up here? A. This is the first time.

Q. Do you know how frequently any other member of your firm has been here since 1952?

A. I do not.

Q. Have they been here at least annually?

A. I couldn't say because I don't know.

Q. Is your firm on an annual retainer from the City of Anchorage? A. No.

Q. Are you here in connection with a rate study or in connection with this case alone?

A. I was asked to come here in connection with this case.

Q. Did you read before you came the analysis of your rate experts of the rates and regulations of the City of Anchorage?

A. I have read some of it, yes. [361]

Q. Do you have it with you? A. No.

Q. How much of it did you read?

A. Oh, I read through the recommendations and how the study was made.

Q. Is it a printed study? A. Yes.

Q. And how long have you been in Anchorage prior to this trial?

(Testimony of Willard H. Reuss.)

A. Oh, I came here, let's see, when was it—Wednesday or Thursday of last week, I believe, just prior to the trial.

Q. And since you have arrived you have talked with Mr. Rader a number of times? A. Yes.

Q. And Mr. Shannon? A. That is correct.

Q. And where was it that you read the report of your analyst on the rates?

A. I believe in Mr. Rader's office.

Q. In Mr. Rader's office. How much time did you spend on that?

A. I'd say about an hour or two.

Mr. Reischling: That is all. [362]

Cross-Examination

By Mr. Cottis:

Q. Mr. Reuss, the various changes in published rate schedules as shown by Exhibits C, D, E, F, and G are they the result of the rate analysis made by Beck and Associates?

A. I believe some of them are. I don't know just how many, but I believe some of them are. There has been some modification even after our recommendations, but I don't know just what they are without going through and studying them.

Q. On your 1952 study of the matter do you know what the return on its invested capital the City was making on its then current rates?

Mr. Rader: If it please the court, I object to that testimony. The only thing this expert witness has testified to is to general rate making policy in

(Testimony of Willard H. Reuss.)

the United States. If we are going to go into the return of the City of Anchorage then we are going to drag this trial out for about 3 or 4 days. The return of the City of Anchorage—there has never been a claim on that so far and it is not in the pleadings. It is improper and I don't think it has any place in the record or anything to do with this witness' testimony.

The Court: The objection is sustained.

Mr. Reischling: May I say, if the court please, counsel opened that phase of it up. It is proper cross-examination.

Mr. Rader: I don't know where I ever opened anything about the return to the City of Anchorage. I asked this man if [363] it is a general policy to have conjunctive billing, combined metering and that type of thing in the states. At least that is so far as I am aware of the extent of his testimony.

The Court: The objection is sustained.

Q. (By Mr. Cottis): What is meant by the term conjunctive billing?

A. Well, I will try and recall what the definition is in the F.P.C. Report. It is where combined energy or demand is read by two or more meters and billed as though it were one meter. That definition is in the National Rate Book if you care to look it up.

Q. If it is more convenient and practicable for the utility supplier to use more than one meter to serve a consumer who is entitled to one point

(Testimony of Willard H. Reuss.)

service would you then call such an arrangement conjunctive billing?

A. Would you repeat that question again?

Q. If for the convenience of the utility company it is more practicable to use more than one meter in order to serve a consumer who is entitled to one point service would that come within the definition of conjunctive billing?

A. You have more than one point of service?

Q. Yes.

A. That would be conjunctive billing.

Q. Now, we are assuming that the consumer is entitled to one point service, but that is because of topographic, geographic [364] or some other element for the convenience of the utility company, separate meters are installed and combined reading given. Is that conjunctive billing?

A. You mean where you have one point of delivery?

Q. No. Physically set up it is more than one point of delivery but the additional points of delivery are there for the convenience of the utility company.

A. Like out at this particular instance?

Q. Yes. A. That is conjunctive billing.

Q. Well, are you assuming, as I asked you to, that it is set up for the convenience of the City, the arrangement?

A. I believe under this case it would be determined conjunctive billing.

(Testimony of Willard H. Reuss.)

Q. Have you been out and examined these installations?

A. Yes, I have seen I think one or two. Was it two that we saw?

Mr. Rader: I believe it was.

A. I think I saw two and I don't remember which housing unit it was in.

Q. Now do you know of instances where the utility supplier uses separate meters for its own convenience entirely?

A. And combines the billing?

Q. Yes. A. Yes.

Q. What sort of instances are there that you are aware of? [365]

A. Well, I can think of one instance where you have single phase and 3-phase power and where the rate schedule is such for the light and power that they add the two readings there to make one reading.

Q. Are there instances of a large factory building, for example, with more than one entrance?

A. I believe that might be correct.

Q. Actually the National Electrical Code envisions such things, does it not?

A. Where you have a large load and under one roof that is sometimes done—split that load up.

Q. Now what difference does it make whether it is under one roof or not?

A. I don't know what difference it makes. I don't know what you are leading to. What difference in what respect?

(Testimony of Willard H. Reuss.)

Q. Well, from the point of view of furnishing electrical energy and ignoring completely the matter of metering that energy does it make any difference whether there are two service drops to a single building or a separate service drop to each of two buildings that are separated by a space of 5 feet? From the point of view of the supplier in considering only the delivery of energy it makes no difference, does it, whether a roof covers that intervening 5 feet or not?

A. Well, from the standpoint of service it makes no difference, no. [366]

Q. If you assume, as testified by Mrs. Hall, that each of these projects would be treated as one consumer and that friendly relations existed between the City and these project owners is it not true that the present arrangement of electrical connections is a simple and practicable arrangement?

A. I think it is evident by the way it has already been done, yes, it is a simple way to do the electrical arrangement.

Q. And it would be a practicable way of effectuating the intent of the parties if the intent of the parties was that the house consumption would be treated as one consumer?

A. I think under that assumption you would certainly have to go into the terms and conditions of the contract you would be entering into.

Q. Well, assuming, as I say, an agreement or contract between the parties that the project owner would be entitled to having house current treated

(Testimony of Willard H. Reuss.)

as one consumption, is there any more economical or practical or feasible way of arranging the delivery of energy than it now is?

A. Physically no.

Mr. Rader: I think we stipulated, if it please the court, that this was the most economical and most practicable way to supply these premises with electrical energy.

The Court: Well, I thought there was some such stipulation too, but I am not positive about it.

Mr. Rader: I believe that there was. [367]

Mr. Cottis: Well, I am perfectly happy to have you stipulate. I am not sure there was. Anyhow, it is now stipulated, is that right?

Mr. Rader: Well, perhaps you better go on with the witness. It was my recollection that it was stipulated but that question has been answered so it is not necessary to go on with that.

Q. (By Mr. Cottis): In other words, Mr. Reuss, the simple addition of meter readings under such an arrangement is merely a division of—to accomplish the intent of the agreement and does technically represent conjunctive billing, does it?

A. I wouldn't say so.

Q. I am not sure that I understand your answer.

A. The answer is that it is conjunctive billing.

Q. Maybe——

A. Maybe I didn't get your question.

Q. Let me put it this way: We are assuming an agreement between the consumer and the supplier under which the consumer is entitled to be treated

(Testimony of Willard H. Reuss.)

as one customer. For the purposes of paying for its house current we are assuming that the most practicable, economical, feasible way of delivering the power is the way it has been done on Government Hill with a separate service drop to each building. Now, with those assumptions would the combining of meter readings still fall [368] within your definition of conjunctive billing?

A. I would say so by definition.

The Court: I think we will recess at this time for 5 minutes.

(Whereupon, at 11:10 o'clock a.m., following a 5-minute recess, court reconvenes and the following proceedings were had.)

Q. (By Mr. Cottis): If the separate meters were installed for the convenience of the utility company, the City in this case, does it still not represent an effective method of giving the benefits of single-point service?

A. I don't quite understand what you are driving at there.

Q. Normally the City's facilities end at the meter base, do they not? A. That is correct.

Q. And with single point delivery of energy the consumer would either maintain or make arrangements to maintain the facilities on his side of that single point of entry, is that correct?

A. That is correct.

Q. Now, the consumer would get the benefit of applying the sliding scale to the total house con-

(Testimony of Willard H. Reuss.)

sumption, would he not? A. That is correct.

Q. Now, if, for the convenience of the City, instead of making a physical single point of entry several points of entry are [369] made and several meters are installed, that is still, is it not, a practicable way of giving him the benefits that he would have realized from a single point of entry?

A. Pose that question again.

Q. By combining——

The Court: It seems to me that the court itself is able to draw that inference. It is just a matter of billing, isn't it?

Mr. Cottis: Yes, your Honor.

The Court: That is one method of billing which can be done just as well as others with that kind of installation?

Mr. Cottis: Yes, your Honor. I will not press that question.

Q. (By Mr. Cottis): If these establishments had been your client's in the original stages of this matter, that is, before construction was too far along, what would your advice have been in order to enable your clients to obtain the most favorable rate?

A. Well, in order to determine that I would have went to the utility to find out what their policy was first. Then from determining what their policy was I may have been able to do it one or two different ways. It all depends on what their policy is.

Q. Now suppose that you did go to the utility and was informed that until August of 1949 we had

(Testimony of Willard H. Reuss.)

a policy against combining meter readings but we repealed that policy formally and the [370] door now is wide open. Then what would your recommendations have been?

A. Then your only alternative would have been to have provided all the facilities in that area and had primary metering at one point of delivery, if the policy was so that you could do that.

Q. You mean there would have been no alternative of making arrangements for combining these separate meter readings?

A. That is correct. There would not have been any alternative.

Q. Why?

A. Well, if their policy says that you can't combine your meter readings then——

Q. I either misspoke or you misunderstood me. You go to the utility company and you say, "What is your policy?" Their answer is, "We don't have any policy against combining meter readings. True, we had such a policy and it was expressed in the ordinance 55 until 2 months ago or some such time and at that time we repealed that ordinance so today we have no policy at all——"

Mr. Rader: If it please the court, it seems to me like that question is a combination of a question, argument and final summary of counsel's case, or something. I don't know how this witness can answer that kind of question.

The Court: It seems to me that the form of the question assumes the non-existence of policy merely

(Testimony of Willard H. Reuss.)

because the [371] ordinance had been repealed apparently without the knowledge of those concerned in these matters, but as I see it the existence of a policy does not depend on the co-existence of an ordinance.

Mr. Cottis: If the court please, I don't know about the repeal of the ordinance without the knowledge of those concerned because it was certainly done formally by the council and the mayor and so on, on the existence of a policy where the City Manager is empowered to make rules and regulations and doesn't. So where this ordinance, that does purport to set forth some very definite legislative intent, that is repealed I would think that the inference, if anything, was that we repealed that prohibition against combined meters so as to open the door and permit it in appropriate cases.

The Court: Of course, that argument could be made but the point I am making is that I think it is a mistake to assume that because an ordinance has been repealed that there is no policy. And, of course, the fact that that ordinance was assigned as a basis for the action certainly seems to be pretty conclusive proof that those concerned in these matters were acting in the belief that the ordinance was still in existence. So it seems to me that the question as formed assumes two things, (1) that those concerned in these matters knew that the ordinance had been repealed and, of course, legally they would be chargeable with knowledge, but we are down to actual knowledge now, and the other is a policy

(Testimony of Willard H. Reuss.)

could not exist in the absence of the ordinance [372] itself. I think both of those are assumptions that are contrary to the—one is contrary to the evidence and the other one seems to me does not necessarily follow——

Mr. Cottis: I can't agree that it is contrary to the evidence, your Honor, because——

The Court: Well, it is contrary to the evidence until, you might say, it was shown that the ordinance had been repealed and that only took place yesterday, but all the evidence and the acts of the City with reference to these matters I think it is clearly shown to have been in the belief that the ordinance existed and that belief persisted until it was shown to the contrary here yesterday.

Mr. Cottis: I certainly don't think that we can presume the City was ignorant of the repeal of that ordinance in November of 1951 at which time they turned down the request of the plaintiffs.

The Court: But I am not speaking of the City. Undoubtedly that is true. I am speaking of those who were concerned in these matters that have been made the subject of testimony here. Now obviously they didn't know of it then. All of the testimony points to that fact. The City council might have done it, I don't know whether the City council did or not, but so far as actual knowledge is concerned I think that the testimony all negatives knowledge on the part of those concerned with these matters involved in this controversy.

Mr. Cottis: By the phrase "those concerned"

(Testimony of Willard H. Reuss.)

does [373] your Honor refer to Mr. Rader alone?

The Court: No. No, I am referring to those who were responsible for, you might say, executing it or giving effect to the rate schedules so far as billing is concerned.

Mr. Cottis: That is employees of the City, your Honor.

The Court: Employees and officials of the City—those charged with the responsibility for administering—

Mr. Cottis: I follow you now.

Q. (By Mr. Cottis): Mr. Reuss, our memories are all fallible on these matters but if you will assume that I am correct in recalling that Mrs. Hall testimony that the policy of the City as outlined by the City Manager in the years 1950 and '51 and thereabouts would permit combined meter readings on these two establishments, is there any reason that you know of why that policy shouldn't have been followed? A. None.

Q. You spoke on direct examination of some difficulty possibly in allocating costs between the tenants and the house. What in your opinion would be the proper method of making such an allocation?

A. Between the tenants and the house service?

Q. Yes.

A. The proper method would be to take all your costs into consideration and arrive at an [374] average.

Q. But then consider the situation where you have 22 tenants on a domestic rate and the house on

(Testimony of Willard H. Reuss.)

the commercial rate, in making an allocation between those two classes of consumers would you make that allocation on the number of kilowatt hours of energy consumed or on the amount of billing, the amount of money actually paid to the utility company on the nature of the loads the demand required what would be the reasonable basis in your opinion of allocation?

A. You have to take all of those components that you named into consideration.

Q. From an engineering point of view it would be perfectly possible to do it, would it not?

A. Oh, yes.

Q. You stated on direct examination, I believe, that to find accurately the effect of combined billings here the rate schedule would have to be reanalyzed. Is my recollection right?

A. Not only rate schedule, but rate schedules—all of them.

Q. Is the reason for the importance of such matters normally the slender margin of profit, or return if you prefer the word, which a utility company gets on its invested dollar?

Mr. Rader: If it please the court, I want to make the same objection to that question as I made previously and, that is, that counselor is attempting now to go into the return from the utility operation over the past, I would say, some 5 or 6 years [375] and then we are going to get into an awful lot of problems on valuation and propriety of return. the

(Testimony of Willard H. Reuss.)

amount of return, and I would also assume we would have to produce evidence relative to the conditions at that time in Anchorage, the growth of Anchorage and the fact that part of our utility system with Anchorage Public Utilities Commission is operated by them. I think we will get into a fantastic field if we start going into return with the utilities. This case is not a case where they alleged return nor is there any evidence as to return.

The Court: I don't think the question is susceptible of that interpretation, but I think that it ought to include the element of uniformity; not only marginal return but the element of uniformity would be something that would necessitate this wholesale revision.

Mr. Cottis: Your Honor, I left out uniformity. I don't think it is applicable where you have only these two establishments that are coming into existence and no comparable establishments.

The Court: That doesn't preclude the element of uniformity. After all, it seems to me that the uniformity would not only comprehend matters in the usual sense, but relative or comparative. For instance, it could be said that certain rates are uniform in the sense that there is no great disparity between them considering everything that would enter into this determination and so it seems to me that where that degree of uniformity or that uniformity [376] in that sense would be disturbed it should be taken into consideration just as well as the fact that the returns on the investment might be marginal and

(Testimony of Willard H. Reuss.)

would necessitate a wholesale revision of the schedule.

Mr. Cottis: In other words, the element of uniformity to which you refer would be the relationship between different classes of rates?

The Court: Yes. You might refer to it as a desire to avoid too great a disparity between the two schedules, the different consumers.

Mr. Cottis: I follow you.

Q. (By Mr. Cottis): Mr. Reuss, is it partly the undesirability of disparity in a different rate schedule and partly the marginal return on profit which a public utility makes that would have required a rate reanalysis?

A. I believe the answer is correct, yes. You would have to analyze it to see if you still were remaining whole on the situation.

Q. Now, if it should happen somehow that the utility company was making, say, 100 per cent on its invested dollar would there then be any need for a rate reanalysis?

Mr. Rader: If it please the court, the same objection. We are getting into another question here which is going to lead us far afield. [377]

The Court: I am not going to permit you to go into the return here on the investment, but this question I think doesn't have any tendency to do that and it is a good deal similar to the one previously asked. I think it is a proper question.

Mr. Rader: If it please the court, I want to make another objection on the basis there is no such fact

(Testimony of Willard H. Reuss.)

in evidence and he is asking for a hypothetical answer. It is not based on anything in this case and there is no fact in here which would give him the right to make an assumption of 100 per cent return or any other return. There is no evidence in the case as to return.

The Court: Well, but it is proper cross-examination on the testimony given by the witness that in case of a certain change it would require a revision of the rate schedules and so he could ask the witness, "Well, why would such a revision be required," but he has elected to proceed by putting his questions in another form. There is nothing objectionable about the question in that form. It is just a matter in which he has a choice. You may answer the question.

A. If the City still desired to make a 100 per cent return on their investment then you would have to revise the rates. If 90 per cent was acceptable to them then you wouldn't.

Q. In other words, it would, from that aspect of the matter, be analogous to giving a wage rate to the employees of its electrical department, is that right? A. I don't believe it is analogous. [378]

Q. You are talking about the mere fact its revenues would be reduced somewhat beyond what they are, is that right? A. That is correct.

Q. The same result then would obtain with the expenses increased, is that correct?

(Testimony of Willard H. Reuss.)

A. That is correct.

Q. If the employees of the electrical department were given a wage increase would there be any need for reanalyzing the rate schedule?

A. How much?

Q. 5 per cent? A. Possibly no.

Q. Do you know how long the rate schedule that is expressed in Exhibit C, that is the one that was in effect in 1951—do you know how long that had been in effect prior to that time?

A. No, I don't.

Q. Do you know whether it was more than 5 years, for example?

A. I don't know. I think it was brought out in the testimony but I don't recall what it was.

Q. What is the normal accepted standard of a fair return on the invested dollar in connection with electricity?

Mr. Rader: Objection, your Honor.

The Court: Objection sustained.

Mr. Cottis: Your Honor, I offer to show by [379] this witness that the City of Anchorage in 1949, 1950 and 1951 was demanding and receiving a return on its invested dollar that is far in excess of normal practice.

The Court: But why do you offer that? Now, suppose you proved it. Then what would we do with that proof?

Mr. Cottis: I would offer it for the purpose of showing that it is perfectly reasonable to consider that the City did make the arrangements testified

(Testimony of Willard H. Reuss.)

to by Mrs. Hall on the theory that if I am selling oranges and I am marking them up five hundred per cent I might give you a quantity price on oranges where I would withhold it from another customer. And I would like to put before the court what I believe is a fact that the City was treating electricity just like oranges or any other commodity at that time and that they would make a deal here and deal there. They were being pressed by competition from Chugach Electric and Inlet Power Company and they weren't behaving like a utility company.

Mr. Rader: If it please the court, it gets back to the situation, what if he did prove that the City offered them a special rate? Now, Mr. Cottis has assumed here that there was no prior example. The testimony was yesterday that the Alaska Housing Authority since 1946, long before these establishments came into existence, was built exactly as they are today and exactly as these establishments are built. Now, even if we did offer them a special rate it would have been discriminating against [380] Alaska Housing and with all the other units it would have been a discriminatory rate. So assume such a contract was made or assume the City Manager represented it to them, the only evidence in the case so far is that it might have been done during the summer of 1951 and within two or three months the City council readily dissipated any delusion these people might have had about a special rate.

The Court: I think it is possible to point to all

(Testimony of Willard H. Reuss.)

kinds of dereliction on all parts of the City officials. That seems to be the character of city management, but that doesn't make it proper evidence here. Objection sustained.

Q. (By Mr. Cottis): You are familiar, at least from the testimony in this case, Mr. Reuss, are you not, with the general situation concerning the 14-story apartment buildings, the McKinley and 1200 "L"?

A. I am.

Q. In those installations the owners gain the benefit of low incremental cost from single-point service, do they not?

A. I wouldn't say so.

Q. All right. In what way do they not then?

A. Well, the rates are based on average cost and they are billed the rate. I don't know just what you mean by "benefit of low incremental cost." Do you mean on the schedules of the rates?

Q. In the application of the schedules they get the benefit of [381] applying one scale to their house consumption?

A. That is the way the rate works, yes.

Q. If the plaintiff's housing establishments offered an arrangement to the City which is equivalent to that of the 14-story apartment buildings should not the same benefit of the single application of the rate be made available to the plaintiff's establishments?

A. Are you stating that their establishments have one point of delivery, one building?

Q. Either in actuality or because of something for the City's convenience it is spread out.

(Testimony of Willard H. Reuss.)

to by Mrs. Hall on the theory that if I am selling oranges and I am marking them up five hundred per cent I might give you a quantity price on oranges where I would withhold it from another customer. And I would like to put before the court what I believe is a fact that the City was treating electricity just like oranges or any other commodity at that time and that they would make a deal here and deal there. They were being pressed by competition from Chugach Electric and Inlet Power Company and they weren't behaving like a utility company.

Mr. Rader: If it please the court, it gets back to the situation, what if he did prove that the City offered them a special rate? Now, Mr. Cottis has assumed here that there was no prior example. The testimony was yesterday that the Alaska Housing Authority since 1946, long before these establishments came into existence, was built exactly as they are today and exactly as these establishments are built. Now, even if we did offer them a special rate it would have been discriminating against [380] Alaska Housing and with all the other units it would have been a discriminatory rate. So assume such a contract was made or assume the City Manager represented it to them, the only evidence in the case so far is that it might have been done during the summer of 1951 and within two or three months the City council readily dispelled any delusion these people might have had about a special rate.

The Court: I think it is possible to point to all

(Testimony of Willard H. Reuss.)

kinds of dereliction on all parts of the City officials. That seems to be the character of city management, but that doesn't make it proper evidence here. Objection sustained.

Q. (By Mr. Cottis): You are familiar, at least from the testimony in this case, Mr. Reuss, are you not, with the general situation concerning the 14-story apartment buildings, the McKinley and 1200 "L"?

A. I am.

Q. In those installations the owners gain the benefit of low incremental cost from single-point service, do they not?

A. I wouldn't say so.

Q. All right. In what way do they not then?

A. Well, the rates are based on average cost and they are billed the rate. I don't know just what you mean by "benefit of low incremental cost." Do you mean on the schedules of the rates?

Q. In the application of the schedules they get the benefit of [381] applying one scale to their house consumption?

A. That is the way the rate works, yes.

Q. If the plaintiff's housing establishments offered an arrangement to the City which is equivalent to that of the 14-story apartment buildings should not the same benefit of the single application of the rate be made available to the plaintiff's establishments?

A. Are you stating that their establishments have one point of delivery, one building?

Q. Either in actuality or because of something for the City's convenience it is spread out.

(Testimony of Willard H. Reuss.)

A. You have given me two cases.

Q. All right. Assume they offer one point of entry, a single entrance point—whatever the technical term is—for each establishment——

Mr. Rader: If it please the court, now he is assuming this and the evidence of Mr. Reuss was to the fact that that policy is not good and it is not good to have them maintain their own lines, building their own lines and everything else. Now, he has to assume that the City policy was merely to let a person build utility lines all over the City of Anchorage, if they give the City one point of delivery that the City would give them a certain rate. That is not necessarily true either. There is an awful lot of policy in cases I cited to your Honor yesterday, particularly the telephone company case. You couldn't have [382] everybody running power lines here and there where there is public safety involved, where you have to inspect and so forth. Now, this question assumes that the only policy the City has is single-point delivery and it is an improper assumption. It is not in accordance with the evidence and it is not even a half-way complete question.

The Court: Will you repeat the question?

(Whereupon, the Reporter read Question Line 3 through Line 15, page 382.)

The Court: I don't think the court is interested in this witness' personal opinion as to what the City

(Testimony of Willard H. Reuss.)

should have made or what arrangement the City should have made in this instance.

Q. (By Mr. Cottis): I think before we recessed, Mr. Reuss, we were considering the situation and your conclusions as to what you would have done had you been the engineer or architect for these projects at their inception and I believe it was your testimony that you would first have inquired from the City whether there was any policy against combined or combining meter readings. Is my recollection right?

A. I would inquire as to what their policy was, that is correct.

Q. And if you were informed by the City that "We have no policy against combining meter readings" then what would your advice have been to these plaintiffs?

Mr. Rader: If it please the court, I object. That is [383] assuming again they told Mrs. Hall that they had no policy. The evidence is that they were treating Alaska Housing, which is a comparable establishment, that way and had been since 1946, and before and after these people and everyone else in town has been treated the same way. Now, assuming they had made a special situation it is immaterial.

The Court: Well, I think the question calls for an expert opinion on a non-expert matter. The court is able to draw the inference that in that situation he would have advised his clients of what would be the most advantageous to them. You don't need

(Testimony of Willard H. Reuss.)

this witness to give you an opinion on that. It is a non-expert matter.

Q. (By Mr. Cottis): In your experience, Mr. Reuss, have you come across any other situation similar to this in these respects: a similar published tariff, a complete lack of any control through a public service commission or public utility commission or regulatory body of that nature and a complete lack of any ordinances, rules or regulations beyond what appears in these telephone-book published schedules? Have you come across anything like that?

A. You mean a situation exactly like this? No.

Q. Almost invariably there is some regulation, is there not?

A. Yes. May I qualify that statement?

Q. Certainly. [384]

A. Either by regulatory commission or by City council or local rule.

Mr. Cottis: I have no further questions.

Redirect Examination

By Mr. Rader:

Q. Mr. Reuss, what percentage of the power consumed in the state of Nebraska, the rates for that power is analyzed by you or under your supervision in your office?

Mr. Cottis: That has no bearing on the cross-examination, your Honor.

Mr. Rader: If it please the court, on cross-examination Mr. Reischling brought out the fact

(Testimony of Willard H. Reuss.)

that there were several individual municipalities for which Mr. Reuss himself made studies for and I intend to show that 90 per cent, in fact the complete state of Nebraska, except for Omaha, are a client of Mr. Reuss and that the analysis for all of their rates is done by him or persons under his supervision.

The Court: Well, it would appear to be within the scope of that particular cross-examination so the objection is overruled.

A. Are you talking about retail power?

Q. Retail power.

A. I would say approximately 50 per cent, something on that order. [385]

Q. 50 per cent?

A. There are two principal public power districts that retail electricity—Consumers Public Power District who is our client and they serve all except the Omaha area and I'd say that their retail sales is about the same as Omaha so it would be approximately 50 per cent.

Q. You are rate analyst for that area?

A. That is correct.

Mr. Rader: No further questions.

Mr. Reischling: No questions.

(Thereupon, the witness was excused and left the stand.)

The Court: We will recess to 1:30. I suppose that Mr. Davis is here again to inquire as to when we are going to conclude this case.

Mr. Rader: If it please the court, I may have two more witnesses, I am not certain. I don't think they will take very long. I would imagine a half hour or an hour would completely wind up the case.

The Court: We will resume at 1:30.

(Whereupon, at 11:55 o'clock a.m., the court continues the cause to 1:30 p.m. of the same day.)

(At 1:30 o'clock p.m., all counsel being present, the trial of said cause was resumed.)

Mr. Rader: If it please the court, during the noon [386] recess counsel for all the parties stipulated and I believe we are at this time prepared to stipulate to the following statement of facts——

Mr. Reischling: It isn't a statement of fact. It is a statement of Mr. LaZelle if called would testify as you are going to read.

Mr. Rader: Mason LaZelle if called would testify as follows: That he does not recall ever talking to Mrs. Hall prior to the council meeting of November 9, 1951, relative to combining meter readings to give a different rate, or the National Electrical Code although the subject was discussed with him by Mr. Sharp, the City Manager, the same day as the council meeting. Mr. LaZelle would further testify that possibly an inspector who was his employee discussed the matter with Mrs. Hall previous to that time but that if he did discuss it—if the inspector did discuss it with Mrs. Hall in the ordinary course of his employment he should have

come to Mr. LaZelle with the information and Mr. LaZelle has no distinct recollection of his inspector ever having mentioned it to him. Mr. LaZelle would further testify that he cannot say that the inspector did not discuss the matter with Mrs. Hall or himself. He would testify that he did have conversations with Mrs. Hall relative to routine operations of the projects, both prior and after the council meeting referred to.

I would like to read into the record, in case it hasn't [387] already been read, Section 608.1 of the Anchorage General Code dated April 12, 1950.

The Court: Well, what is the significance of that date? Is that the date the code became effective?

Mr. Rader: I am trying to identify it, your Honor. The effective date of the code, yes, when it was enacted as a complete code. The section reads as follows: "The City Manager with the approval of the City council may adopt and promulgate such rules and regulations as may be necessary pertaining to the supplying and discontinuance of electric service to all consumers, including but not being limited to rates, charges for connecting and disconnecting service, separate meters, for separate premises, consumer notices to discontinue service, meter tests, etc., and no person shall fail to comply and it shall be unlawful to fail to comply with any such rule or regulation."

With that the City rests.

Mr. Reischling: Counsel, may I ask at this time that it be stipulated for the record that Sections

2301, I believe it is, to 2306 of the National Electrical Safety Code and 2321, I think it is.

Mr. Rader: I believe we stipulated to that.

Mr. Reischling: I was going to say we could have that copied and offered in evidence as an exhibit so we would not need to have the book in and future reference to those particular sections would be made much more simple. With the consent of the [388] court could we do that?

The Court: There is no reason why it can't be done with the consent of the parties, but what do those sections relate to?

Mr. Reischling: If the court please, those are the sections to which testimony has been introduced which the City at one time, or at least the testimony indicates that certain representatives of the City contended that those sections prevented the City from giving combined billing. I believe that is a fair statement.

The Court: But what purpose are these—what is the purpose of this particular matter? What is it going to prove?

Mr. Reischling: Well, if the court please, the City has taken 3 positions. The first position that they took was that those sections of the National Safety Electrical Code prevented them from giving the benefit of combined billing to the plaintiff corporations. The second position that they took was that Ordinance No. 55 specifically prohibited combined billing. Ordinance No. 55 having been repealed prior to that particular date which disposes of that contention. A mere reading of Sections 2301 to 2306

could have no possible bearing upon the problem before the court.

The Court: From your statement of it then I take it the purpose for introducing these sections of the Code is for the purpose of the City making a mistake. [389]

Mr. Reischling: My purpose in asking it go in is to make a record.

The Court: A record of what?

Mr. Reischling: A record of the proceedings of this trial.

The Court: It has to have some bearing on some issue in the case. That is what hasn't been made plain to me—how these sections so far as anything being said here at the moment is concerned it would show nothing except that the City was mistaken. Now, what good is that?

Mr. Reischling: Well, if the court please, this case may go to a higher court.

The Court: I don't care where it goes. I am asking now what bearing it has on this case here?

Mr. Reischling: It has been testified to and I believe it is properly a part of this record.

The Court: What is the testimony now that would make that competent?

Mr. Reischling: Well, I think counsel will agree with me that witnesses did testify that the City took the position——

The Court: I understand that and I have called attention to it, but my question now is what else would they show except to show that the City was mistaken?

Mr. Reischling: What I want to put in is what these particular sections say. [390]

The Court: For what purpose? To show the City make a mistake? What else would it show? Unless it shows something else, why, it will be excluded.

Mr. Reischling: The court will allow an exception to that ruling.

The Court: Is there any rebuttal?

Mr. Reischling: Plaintiff Panoramic View has no rebuttal.

Mr. Cottis: No rebuttal, your Honor.

The Court: Well, I think in view of the fact I have got a lot of other matters I am going to attempt to dispose of before leaving I will have to ask counsel to file briefs. How much time is required?

Mr. Reischling: If the court please, I will have to try a case as soon as I return to Seattle and I would appreciate it if the court would give me three weeks.

The Court: I suppose there is no objection to that, is there?

Mr. Rader: No.

Mr. Cottis: No.

The Court: How much time do you want? Do you want the same amount of time for your answer brief?

Mr. Rader: I don't think it will take that much time, but I request——

The Court: Three weeks will be allowed to the parties and five days for a reply brief if one is necessary. [391]

Mr. Reischling: Thank you, your Honor. 5 days, that would be exclusive of the court's consideration because of the geographical location that confronts me.

The Court: There has never been any difficulty over the computation of time in which briefs have been filed, but if anything of that kind should develop Rule 6 of the Federal Rules of Civil Procedure will govern.

You may adjourn court then I may be able to get at this other case. We will recess to 3:30.

(End of Record.) [392]

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcript of the proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on March 18, 24, 25, 28, and 29, 1955, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed March 16, 1956. [393]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE—ORIGINAL
RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to the provisions of Rule 10 (1) of the United States Court of Appeals, Ninth Circuit, the provisions of Rule 75 (g) (o) of the Federal Rules of Civil Procedure, and the Designation of counsel for defendant, I am transmitting herewith the Original Papers and Exhibits in my office dealing with the above-entitled action or proceeding, together with the Court Reporter's Transcript of Testimony taken at the trial of the cause.

The papers and exhibits transmitted herewith are described as follows:

1. Complaint, with exhibits filed January 23, 1952.
2. Answer, with exhibits filed February 13, 1952.
3. Stipulation (permitting supplements to complaint) filed March 1, 1955.
4. Supplemental Complaint filed March 1, 1955.
5. Minute Order entitled Pre-trial Conference filed March 18, 1955.
6. Supplemental Complaint filed March 23, 1955.
7. Stipulation (unsigned by the City of Anchorage) filed March 23, 1955.
8. Notice of Demand to Produce (Documents) filed March 23, 1955.
9. Minute Order Entitled Trial by Court filed March 24, 1955.

10. Minute Order entitled Pre-Trial Conference filed March 24, 1955.

11. Minute Order entitled Pre-Trial Conference filed March 24, 1955.

12. Minute Order entitled Pre-Trial Conference filed March 24, 1955.

13. Minute Order entitled Trial by Court Continued (concerning motion to dismiss by City of Anchorage) filed March 28, 1955.

14. Minute Order entitled Trial by Court Continued (on motion to dismiss and denial of same) filed March 28, 1955.

15. Opinion of the Honorable George W. Folta, deceased, District Judge, filed May 25, 1955.

16. Findings of Fact and Conclusions of Law filed May 27, 1955.

17. Minute Order entitled Hearing on Objections of Findings of Fact and Conclusions of Law and Judgment, filed June 17, 1955.

18. Judgment and Decree filed June 21, 1955.

19. Decree filed June 21, 1955.

20. Motion for New Trial filed June 30, 1955.

21. Order Denying New Trial filed August 31, 1955.

22. Notice of Appeal filed September 7, 1955.

23. Order Granting Extension of Time in Which to Docket and File Record on Appeal, filed October 14, 1955.

24. Order Substituting Attorneys filed December 2, 1955.

25. Full and complete transcript prepared by

Official Court Reporter of all proceedings and evidence in the action.

26. Appellee's exhibits Numbers 1 through 10, inclusive.

27. Appellant's exhibits Numbers A through M, inclusive.

The papers herewith transmittted constitute the record on appeal from the judgment filed and entered in the above-entitled action by the above-entitled court on June 21, 1955, to the United States Court of Appeals at San Francisco, California.

Dated at Anchorage, Alaska, this 28th day of March, 1956.

[Seal] /s/ WM. A. HILTON,
Clerk of the United States District Court, Third
Division, at Anchorage, Alaska.

[Endorsed]: No. 15082. United States Court of Appeals for the Ninth Circuit. City of Anchorage, a Corporation, Appellant, vs. Richardson Vista Corporation, and Panoramic View Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Alaska, Third Division.

Filed March 29, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15082

CITY OF ANCHORAGE, a Municipal Corporation,
Appellant.

vs.

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Corporation,
Appellees.

STATEMENT OF POINTS

The Appellant herein makes the following statement of points:

1. Appellant (defendant) was unlawfully deprived of its right to a trial by jury of all issues so triable.

2. The Judgment, Decree and Opinion of the Court are contrary to the law.

3. The Judgment, Decree and Opinion of the Court are contrary to the evidence.

4. The Judgment, Decree and Opinion of the Court are contrary to the weight of evidence.

5. There is no sufficient or substantial evidence tending to support the Opinion, Judgment and Decree entered herein.

6. The judgment of the Court and the Memorandum Opinion, upon which said judgment is predicated, or either of them, do not find sufficient facts nor contain sufficient conclusions of law.

8. The Decree and Judgment as entered and the Memorandum Opinion are not definite enough to dispose of the issues in controversy between the parties in this cause.

9. The Court erred in denying defendant's motion to direct a verdict in its favor at the close of plaintiffs' case.

10. The Memorandum Opinion and the Decree and Judgment entered thereon are not sufficiently clear and definite to apply the doctrines of estoppel and res judicata to future cases and controversies.

11. The Memorandum Opinion filed by the Honorable George W. Folta, deceased, is not sufficient in findings of fact and conclusions of law to enter a decree on the same.

/s/ LYNN W. KIRKLAND,

Attorney for the Appellant,
City of Anchorage.

HARTLIEB, GROH & RADER,

/s/ By JOHN L. RADER,
Special Counsel.

[Endorsed]: March 22, 1956.